No. 88-1636

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ONEIDA INDIAN NATION OF WISCONSIN, ONEIDA OF THE THAMES BAND, AND INDIVIDUAL MEMBERS OF THE ONEIDA INDIAN NATION OF NEW YORK,

Petitioners,

v.

STATE OF NEW YORK AND VARIOUS STATE AGENCIES; TWELVE NEW YORK COUNTIES, VALENTINE RYAN, INDIVIDUALLY AND AS CLASS REPRESENTATIVES; ST. REGIS PAPER COMPANY, INDIVIDUALLY AND AS CLASS REPRESENTATIVE; GEORGIA PACIFIC CORPORATION, INDIVIDUALLY AND AS CLASS REPRESENTATIVE; AND NEW YORK STATE ELECTRIC AND GAS CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of New York could in 1785 and 1788 extinguish title of the Oneida Indian Nation to its aboriginal lands through fraudulent means without the consent or approval of the United States, notwithstanding a provision of the 1784 Treaty of Fort Stanwix, 7 Stat. 15, securing the Oneida Nation in the possession of its lands, and other federal law protections?

2. Whether the Second Circuit correctly dismissed complaints for failure to state a claim for relief based on its assessment of conflicting expert testimony and without reference to compelling decisions of this Court to the contrary?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit herein is published at 860 F.2d 1145 (2nd Cir. 1987), *aff'g* 649 F.Supp. 420. Prior reported opinions in the cases are at 85 F.R.D. 701 (on class certification), 520 F.Supp. 1278, *aff'd in part and rev'd in part*, 691 F.2d 1070 (on the first dismissal of the claims), 102 F.R.D. 445, *rev'd*, 732 F.2d 261 (on intervention of other Indian parties), 757 F.2d 19 (on disqualification of counsel), and 771 F.2d 51 (on motion to recall mandate.)

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered herein on October 31, 1988, and a timely Petition for Rehearing En Banc was filed by petitioners. The Petition for Rehearing En Banc was denied on December 29, 1988. The Oneida parties filed timely applications for an extension of time to file their petitions for certiorari and by orders dated March 23, March 27 and March 29, Justice Marshall granted extensions up to and including April 28, 1989. The jurisdiction of this Court under 28 U.S.C. section 1254(1) is invoked.[1]

[1] This petition is filed jointly by the Oneida Indian Nation of Wisconsin (plaintiff, 79-CV-798), the Oneida of the Thames Band (plaintiff, 79-CV-798), and individual members of the Oneida Indian Nation of New York (plaintiffs, 78-CV-104).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

1. U.S. Const., Art. 1, sec. 10
2. U.S. Const., Art. VI, cl. 2
3. U.S. Const., Art. VII
4. Articles of Confederation, Art. VI, cl. 4
5. Articles of Confederation, Art. IX, cl. 1
6. Articles of Confederation, Art. IX, cl. 4
7. Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15, Art. II
8. Proclamation of Sept. 22, 1783, XXV Journals of the Continental Congress 602

Because of their length, the constitutional provisions, treaties and statutes are set out in the appendix.

STATEMENT OF THE CASE

This appeal involves two separate lawsuits – one, filed in 1978 by the Oneida Nation of New York and named individual members thereof, and a second filed in 1979 by the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band. Although never formally consolidated, the two complaints, 78-CV-104 and 79-CV-798, have been handled together throughout the course of the litigation.

The two complaints assert very nearly identical claims on behalf of the Oneida plaintiffs to the Oneida aboriginal territory, which is approximately five million

acres of present day upstate New York, based upon the federal common law, the Articles of Confederation, the 1784 Treaty of Fort Stanwix, 7 Stat. 15, Article I, sec. 10 of the Constitution, and the 1783 Proclamation of the Continental Congress. The Oneida parties assert that two transactions by which the State of New York purported to extinguish Oneida title in 1785 and 1788 without the consent or approval of the United States were void for violation of these federal laws. Both complaints assert federal jurisdiction under 28 U.S.C. sections 1331 and 1362.[2]

The first complaint names as defendants the State of New York, several state agencies, and numerous municipal governments. The second complaint names as defendants the State of New York, municipalities, individual and corporate landowners, individually and as representatives of a defendant class composed of all occupants of the subject territory, with the exception of homeowners who occupy two acres or less as their principal place of residence. A defendant class consisting of approximately 60,000 property owners was certified by the district court and individual notices as required by the court were mailed to all members of the class. 85 F.R.D. 701 (N.D.N.Y. 1980).

On September 10, 1981, the district court dismissed both complaints for failure to state a claim for relief. The district court determined essentially that at the time of

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[2] These cases involve earlier and different transactions from that considered by this Court in Oneida v. Oneida Indian Nation (Oneida II), 470 U.S. 226 (1985).

the challenged transactions states held authority to unilaterally extinguish Indian title and that the federal treaties and laws relied upon by the Oneida parties either did not or could not establish a different rule or exception to that rule. 520 F.Supp. 1278 (N.D.N.Y. 1981). On appeal, the Second Circuit affirmed dismissal of claims asserting a constructive trust, a perpetual lease, and violation of the prohibition against state treaties in the Constitution (Art. I, sec. 10)[3], but reversed and remanded for further proceedings on Congress' authority to enter into and the meaning of the Treaty of Fort Stanwix, the Articles of Confederation, and the 1783 Proclamation of Congress. 691 F.2d 1070 (2nd Cir. 1982). Noting the complexity of

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[3] The 1788 treaty between New York State and the Oneida Nation was negotiated on September 22 and ratified by New York on December 26, 1788. New York ratified the Constitution on July 26, the eleventh state to do so. According to Article VII of the Constitution, the prohibition on state treaties in Article I, sec. 10, was in effect by the time of the 1788 treaty: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." The court of appeals, in its first ruling in these cases, erroneously rejected this claim, relying on Owings v. Speed, 18 U.S. (5 Wheat.) 420 (1820). 691 F.2d at 1079 n.6. That decision involved private rights under the impairment of contracts provision of the Constitution, not the provision respecting treaty-making, the most solemn of diplomatic engagements. Thus, *Owings* should not govern this issue, particularly given the Framers' deep and consistent concern that the acquisition of tribal land by a state might plunge all of the states into a prolonged war. Worcester v. Georgia, 31 U.S. (6 Peters) 515, 558-59 (1832).

the cases and the substantiality of the claims, the Second Circuit held, "In sum, we do not view the foregoing claims as lending themselves to summary disposition on a motion to dismiss. A more thorough analysis of all relevant evidence offered by the parties is required." 691 F.2d at 1095. None of the parties sought review of the decision by this Court.

On remand, the parties disputed the nature of the proceedings required by the court of appeals. The defendants interpreted the mandate as requiring further proceedings on the motions to dismiss while petitioners interpreted the decision as dispositive of the motions to dismiss and requiring trial on the merits. The Oneida parties proposed that, in any event, the further proceedings on motions to dismiss sought by the defendants be consolidated with trial on the merits pursuant to Federal Rules of Civil Procedure 12(d) and 42(a). The district court rejected the Oneida parties' proposal and scheduled an evidentiary hearing for the limited purpose of aiding the court in interpreting the relevant treaties and laws for the motions to dismiss.

A two week evidentiary hearing was held in September 1984 on the extent of Congress' powers of external sovereignty and the meaning of the Articles of Confederation, the Treaty of Fort Stanwix, and the 1783 Proclamation of Congress. Eleven historians and political scientists, qualified as experts on Indian/white relations or relative federal/state authority at the time, testified and submitted extensive reports with supporting primary documents on the remanded issues. On November 1, 1986, the district court dismissed the complaints for failure to state a claim for relief and adhered to its earlier

interpretation of the federal laws and treaties involved. 649 F.Supp. 420 (N.D.N.Y. 1986).

The Oneida parties appealed again to the Court of Appeals for the Second Circuit, raising all the issues decided against them by the district court. The appeal was argued on June 2, 1987, and decided on October 31, 1988. The court of appeals affirmed the Rule 12(b)(6) dismissal of the Oneida claims.

In doing so, the Second Circuit held that numerous contested factual issues should be resolved against petitioners, and gave a narrow reading to federal sovereignty under the Articles of Confederation, which the court read to reserve certain rights to the states, and to the language and pre-emptive effect of the Treaty of Fort Stanwix.

As an initial matter, the court held that under the Articles of Confederation, Congress' power to enter into peace treaties with Indian tribes came not from Article IX, clause 1 (powers of war and peace), but from Article IX, clause 4 (Indian affairs). In addition, the court construed states' right of pre-emption to tribal land reserved in clause 4 as including the power to unilaterally extinguish Indian title, in sharp contrast to the right of pre-emption preserved for states under the Constitution.[4] As a result,

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[4] The right of pre-emption to tribal lands, or the underlying fee title, is held in the original thirteen colonies by the states. Oneida Indian Nation v. County of Oneida (Oneida I), 414 U.S. 661, 667 (1974). However, this extant property interest held by the states is not inconsistent with the power to extinguish Indian title held exclusively by the United States. *Id.* The states' right of pre-emption gives states unencumbered title

(Continued on following page)

the court held, states could extinguish Indian title within their borders as long as they did not thereby interfere with Congress' determinations on war and peace with the Indians. The Second Circuit, however, declined to rule – as a "non-justiciable" issue – on whether New York's actions might in fact have interfered with congressional jurisdiction over matters affecting war and peace. The court further ruled that the doctrine of the federal government's external sovereignty did not preclude the states from entering into their own land agreements with Indian nations.

Then, notwithstanding the settled rule requiring a broad construction of treaties in favor of the Indians, the court of appeals read the 1784 Treaty of Fort Stanwix and the accompanying course of conduct narrowly, to give the Indians no legal protection against state land acquisitions. The Second Circuit, in so ruling, accorded little weight to either the extensive fact testimony of the Oneidas' experts or the broad language of the Treaty securing the Oneidas in the possession of their land. The court of appeals held moreover that the Treaty, absent an express ban on state land purchases, would not be read to preempt them. Finally, the court held that Congress'

(Continued from previous page)

and the right to occupy tribal lands, but only when the United States has first extinguished the tribe's title thereto. Mitchel v. United States, 34 U.S. (9 Peters) 711 (1835); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). The court of appeals here held that clause 4 reserved the right of pre-emption to tribal lands for states, but construed the right of pre-emption to include the power to extinguish Indian title as well.

Proclamation of 1783 did not apply to New York's land transactions with the Oneida Nation. Petitioners filed a timely petition for rehearing en banc which was denied by the court of appeals on December 29, 1988.[5]

REASONS FOR GRANTING THE WRIT

I. The court of appeals' disposition of the Oneida claims conflicts directly with longstanding and fundamental principles of Indian treaty interpretation formulated by this Court.

As a principal basis for their claim that New York State lacked authority to extinguish Oneida title in 1785 and 1788, petitioners assert Article II of the 1784 Treaty of Fort Stanwix, which provides that "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled." 7 Stat. 15. The court of appeals read Article II as having no preclusive effect on state authority or action because the Article does not expressly so provide. This pre-emption analysis is flatly contrary to that required by this Court in interpreting Indian treaties and statutes:

> Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. (citations omitted). *We have thus rejected the proposition that in order to find*

[5] In addition to the matters discussed in Reasons for Granting the Writ, petitioners expressly reserve for briefing on the merits the issues relating to the interpretation of the Articles of Confederation and the 1783 Proclamation, and the date upon which the Constitution became applicable to state dealings with the Indians, as fairly comprehended in the Petition's Questions Presented.

> *a particular [state] law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required.*

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (emphasis added.)[6] By reversing the pre-emption analysis traditionally applied to Indian treaties, the court of appeals not only denied petitioners here a remedy for the unlawful taking of their ancestral lands, but also has thrown into question a major source of contemporary tribal rights.

During the treaty making period, the United States Senate ratified approximately 400 Indian treaties, covering all manner of relations between the United States and Indian tribes, such as war and peace, commerce, land cessions, and jurisdiction. *See* 7 Stat. at Large, a compilation of all ratified Indian treaties. Even though relations

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[6] In *Bracker*, the Court explained the analysis to be applied in determining whether federal treaty or statute pre-empts the application of state law to reservation activity or resident Indians. The Court referred to the unique status of Indian tribes and the special relationship between tribes and the United States in concluding that federal law may pre-empt the application of state law in this area even in the absence of a direct conflict or express federal prohibition. *Id.* In the case of Indian treaties, there is an additional reason for this expansive preclusive effect, i.e., the canon of construction requiring a liberal reading of Indian treaties. *See* Choctaw Nation of Indians v. U.S., 318 U.S. 423, 431-32 (1943). If read liberally, an Indian treaty may pre-empt state law through operation of the Supremacy Clause, even though the treaty may not expressly so provide. In this respect – the rule requiring liberal construction and broad preclusive effect – Indian treaties are similar to other treaties. *See* discussion *infra*, pp. 17-18.

with tribes are now conducted pursuant to federal statute, the ratified treaties constitute a major source of modern federal Indian law. *See generally*, F. Cohen's *Handbook of Federal Indian Law* 1942 (reprinted 1986, University of New Mexico), pp. 33-46.[7]

Because of the primacy of Indian treaties as a source of federal Indian law, this Court has frequently examined and interpreted the terms of various Indian treaties to determine present day rights and obligations of tribes and their members. A substantial and cohesive set of principles respecting the meaning and scope of Indian treaties has resulted. It is established that Indian treaties, including those negotiated before the adoption of the Constitution, fall within the purview of the Supremacy Clause of the Constitution. *Worcester v. Georgia*, 31 U.S. at 559. Indian treaties pre-empt state authority over the subject matter of the treaty, even though the treaty may not so provide by its express terms.[8] In such diverse areas as fishing rights (*Washington v. Fishing Vessel Association*, 443 U.S. 658 (1979)), taxation (*McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973)), and water rights (*United States v. Winans*, 198 U.S. 371 (1905)), Indian

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[7] Indeed, the 1871 statute ending treaty-making with tribes directed that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Act of March 3, 1871, 16 Stat. 566, codified at 25 U.S.C. section 71.

[8] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982); White Mountain Apache Tribe v. Bracker; Antoine v. Washington, 420 U.S. 194 (1975).

treaties have been construed to implicitly grant substantial federal rights to Indian tribes that are beyond state regulation or extinguishment.

Indeed, this Court has broadly read the very treaty in issue here, along with later federal treaties with the Six Nations, as granting substantial federal rights beyond the reach of state authority. In *The New York Indians* (*Fellows v. Denniston*), 72 U.S. 761 (1867), the question before the Court was the applicability of a New York State tax on tribal land. The state statute expressly provided that the tribes' occupancy would not be disturbed in the event of tax delinquency. Nonetheless, the Court reasoned that the state tax authorized extensive interference with the tribes' possession of their lands – e.g., entry upon the land to lay out roads, construct and repair roads and bridges, assess and collect taxes – and that such interference was pre-empted by federal treaties with New York tribes, including the Treaty of Fort Stanwix, which guaranteed the tribes the occupancy of their lands. *Id.* at 768-769.

If the Treaty of Fort Stanwix and later federal treaties pre-empted a state tax that by its own terms could not disturb the tribes' possessory interest in their lands, then the Treaty surely pre-empted state authority to extinguish the tribes' possession outright. *See also Washington v. Fishing Vessel Ass'n* and *United States v. Winans*, where this Court construed the same operative verb appearing in Article II, i.e., "securing" certain rights, as granting federally protected fishing rights and water rights, respectively, that are beyond state authority.

The construction of Article II as precluding state extinguishment of Oneida title without federal consent or

approval does not depend solely on canons of construction. The record here also demonstrates the error of the Second Circuit's narrow construction. Shortly before the Fort Stanwix treaty negotiations, the United States commissioners learned of and expressed alarm about New York State's plan to acquire Oneida and other Six Nations' territory. As a result, the treaty commissioners assured representatives of the Six Nations at the Fort Stanwix negotiations that the State of New York had no authority to treat separately with them.[9] In addition, the

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[9] After learning of New York State's earlier and unsuccessful attempt to negotiate a treaty of peace and a land cession with members of the Six Nations Confederacy, the federal treaty commissioners advised the Governor of their plans to negotiate with the Confederacy members and invited him to participate. The federal treaty commissioners described this effort in a letter to the President of Congress:

> Tho we gave due information to the Governor of this State of the time and place of holding the treaty, that if he had any business to transact with the Indians he might do it under the patronage of the United States. But he chose to hold a treaty with the Six Nations before us, and we are told endeavored to make peace with them in the name of this state. We cannot learn that he succeeded in purchasing territory from them; and we thought proper to inform the Indians in our conference that a treaty with an individual State without the sanction of Congress could be of no validity.

Plaintiffs' exhibit numbered JC-52. The court of appeals acknowledged this concern of the federal treaty commissioners and quoted this letter. But the court deleted from the quote the reference to the states' effort to purchase territory from them and then concluded that the federal treaty commissioners' concerns had nothing to do with state authority to extinguish Indian title. 860 F.2d at 1166.

final treaty contained the Article II assurance quoted above as an expression of the United States' appreciation for the valuable services of the Oneida and Tuscarora Nations, which had fought as allies of the United States in the Revolutionary War.[10] B. Graymont, *The Iroquois in the American Revolution* (1972). Despite these federal assurances, New York State dispossessed the Oneidas of roughly 90% of their treaty protected territory under duplicitous and coercive circumstances within three years. *Oneida Indian Nation v. United States*, 37 Ind.Cl.Comm. 522, *aff'd*, 576 F.2d 870 (Ct.Cl. 1978).[11]

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[10] During the Revolutionary War, the Oneidas had been displaced from their territory because of persistent attacks upon them by the British and Britain's Indian allies. Tr. 1122-24. Thus, the Oneida Nation was particularly interested in a federal guarantee for their territory. *See* The New York Indians, 72 U.S. at 766. In addition, New York State in 1783 formulated a plan to acquire Oneida territory and push the Oneidas westward into Seneca territory, thereby displacing the Senecas altogether. The federal Indian agent learned of this plan and warned Congress against it: "If driven to reside in the British territory, they [the hostile Iroquois nations] will add strength to those people in the very quarter where they wish it, and in the case of a future rupture, expose the western country to the most dreadful calamities." Plaintiffs' exhibit numbered JC-37. Congress rejected New York's plan for fear of touching off large-scale Indian wars. In the interest of maintaining long term peace and out of solicitude for its former ally, the United States adopted the more moderate and protective policy reflected in the terms of the Treaty of Fort Stanwix. Tr. 1130-1162.

[11] There were two separate transactions between New York State and the Oneida Nation by which the Oneidas were

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Without reference to this Court's opinions on the general subject of treaty interpretation or the specific language of Article II, the court of appeals affirmed dismissal of the Oneida treaty claims. This result represents a dramatic and dangerous departure from traditional principles of Indian treaty interpretation. It is dramatic because the court of appeals formulated a new rule requiring explicit language pre-empting state authority over the subject matter of an Indian treaty. It is dangerous because the court of appeals' reasoning resulted in forfeiture of the Oneida territory and, if applied to other Indian treaties, would extinguish the majority of tribal rights presently enjoyed under federal treaties. The writ of certiorari should issue so that longstanding and basic principles of Indian treaty interpretation and the substantial tribal rights enjoyed thereunder can be preserved.

II. These cases raise important issues of federalism that should be reviewed by this Court.

This is principally an Indian law case raising substantial federal Indian law issues. However, in two important respects, the case also presents more general issues of federalism that should be reviewed by this Court.

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dispossessed of the subject land, the first in 1785 and the second in 1788. In a proceeding filed by the Oneida governments against the United States for breach of trust for failing to protect the Oneidas from overreaching by New York State, the Indian Claims Commission examined the nature of those two transactions in detail and found that both were coercive and fraudulent. Oneida Indian Nation v. United States.

First, the existence and scope of Congress' authority as external sovereign, independent of any organic document, are controverted here. This Court has held that Congress acquired certain powers of external sovereignty immediately upon this country's separation from Great Britain. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-17 (1936). Those powers include the conduct of foreign relations and control over war and peace. *Id.* Petitioners assert as one of the bases for their claims that Congress, as external sovereign, could pre-empt or regulate any state authority to extinguish Indian title where necessary to establish and maintain peace. *See Worcester v. Georgia*. Congress did so, petitioners further assert, in the Treaty of Fort Stanwix. These assertions are supported by primary documents as well as expert opinion in the record.[12]

The court of appeals rejected the doctrine of external sovereignty as support for the Oneida claims for two reasons. First, the court reached the remarkable conclusion that the issue is not justiciable. It reasoned that Article III courts cannot determine whether a particular state acquisition of tribal land imperiled peace, even where the United States had previously made that judgment and concluded a peace treaty reflecting that

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[12] *See* documents cited above and deposition of Richard Morris, pp. 37-87; *see also* R. Morris, "The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty Over Seabeds," 1974 Colum. L. Rev. 1056.

judgment. 860 F.2d at 1162.[13] In the alternative, the court concluded, without reference to this Court's decisions to the contrary, that Congress' powers of external sovereignty cannot override an express reservation of authority for the states in an organic document, in this case, the Articles of Confederation. *Id.*

Because the states never possessed any powers of external sovereignty, reserved state powers in either the Articles of Confederation or the Constitution cannot limit Congress' powers of external sovereignty. *Curtiss-Wright*, 299 U.S. at 316-18; *see also U.S. v. Pink*, 315 U.S. 203, 223-25 (1942); *U.S. v. Belmont*, 301 U.S. 324, 330 (1937). Rather, Congress' powers of external sovereignty are limited by the exigencies of the national interest and well-being. *Missouri v. Holland*, 252 U.S. 416, 433 (1920). The resolution of apparent conflicts between Congress' treaty making power as external sovereign and reserved state

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[13] There is no political question here. Resolution of the one discrete historical issue of fact does not implicate any of the factors that the Court identified in Baker v. Carr, 369 U.S. 186, 217 (1962), as distinguishing cases involving political questions. The courts are not being asked to question the wisdom of any action by any branch of federal or state government, or to question the characterization put on any such action by a branch of government. Rather, the court is merely asked to decide whether Congress' exclusive power under Article IX(1) of the Articles of Confederation "of determining on peace and war" was implicated by the Treaty of Fort Stanwix and subsequent actions of New York State. In so deciding, the courts need not determine whether the federal government's or New York State's actions were wise or desirable. The courts need only determine the narrow threshold issue of whether, just months after the end of a decade of bitter warfare, New York's land purchases in any way involved issues of peace and war that were exclusively within federal purview.

powers or individual rights is a vital and recurring issue. *See Reid v. Covert*, 354 U.S. 1 (1957), where a federal treaty was challenged as violating criminal due process rights; and *Missouri v. Holland*, where a treaty was challenged as violating states' reserved authority under the Tenth Amendment of the Constitution. The court of appeals abdicated its obligation to resolve that apparent conflict here, to the detriment not only of the Oneida claims but also of Congress' treaty making authority as external sovereign generally.

The second general issue of federalism raised here is the reach of federal treaties, international as well as Indian, achieved through application of the Supremacy Clause of the Constitution. U.S. Const., Art. VI, cl. 2. The Supremacy Clause does not on its face distinguish Indian treaties from other federal treaties. Neither does the Supremacy Clause distinguish between confederation period and constitutional period treaties. To the contrary, the Supremacy Clause expressly makes "all Treaties made, or which shall be made," paramount to state law. *Worcester v. Georgia*, 31 U.S. (6 Peters) at 559.

The court of appeals' new rule requiring express treaty language to pre-empt state law is not limited by its logic to Indian treaties. Treaties generally are to be construed more liberally than private agreements. *Volkswagenwerk v. Schlunk*, ___ U.S. ___, 100 L.Ed.2d 722, 731 (1988), quoting *Choctaw Nation of Indians v. U.S.*, for the canon requiring liberal construction of treaties. Thus, treaty provisions broadly read prevail over state law by force of the Supremacy Clause, even in the absence of a direct conflict or an express federal prohibition. *Nielson v. Johnson*, 279 U.S. 47, 51-52 (1929); *Antoine v. Washington*,

420 U.S. at 206, where the Court observed that together the rule requiring liberal construction of treaties and the Supremacy Clause obviated the need for express language prohibiting the qualification or extinguishment of a federal treaty right.[14] Thus, the court of appeals effectively narrowed the operation of the Supremacy Clause as to all federal treaties.

These two matters – the reach of Congress' authority as external sovereign over war and peace and the application of the Supremacy Clause to any treaty entered into under that authority – are basic to our federal system. The court of appeals' decision here has implications for both that require review.

III. The courts below decided the important issues in these cases by considering conflicting evidence on motions to dismiss for failure to state a claim, thereby violating Federal Rules of Civil Procedure 12 and 56.

On a motion under Rule 12(b)(6), a court's limited inquiry is whether a set of facts exist in support of the claim. *Conley v. Gibson*, 355 U.S. 1 (1957). Where a motion to dismiss is converted into one for summary judgment by the introduction of extraneous material, the inquiry is

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[14] In this regard, pre-emption rules governing treaties differ from those governing federal statutes. With respect to the latter, pre-emption of state law by federal statute or regulation is not favored and will not be found "in the absence of persuasive reason – either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

whether a dispute exists as to any material fact. F.R.C.P. 56. The court cannot try controverted facts on either motion. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974), on motions to dismiss, and *Carter v. Stanton*, 405 U.S. 669 (1972), on motions to dismiss converted into motions for summary judgment. In these cases, the district court and the court of appeals considered substantial and conflicting extraneous material, and in dismissing the Oneida claims, effectively tried the controverted issues. This result is impermissible on either a motion to dismiss or for summary judgment. *Id.*

As noted in the Statement of the Case, the parties disputed the nature of the proceeding required on remand from the court of appeals' first decision in this case. *See* 691 F.2d 1070. Over the objection of petitioners, the district court interpreted the court of appeals' mandate as requiring an evidentiary hearing for further consideration of motions to dismiss for failure to state a claim for relief. The district court conducted a hearing for that purpose, with petitioners having no meaningful opportunity to present factual material other than in direct rebuttal to the defendants' evidence.

Discovery for the hearing was restricted to document production and one round of expert witness interrogatories. The district court expressly prohibited depositions or any other means of exploring the parties' evidence in depth. In order to avoid complete surprise, the parties agreed among themselves to exchange expert reports immediately before the hearing. The defendants, whose experts proceeded first at the hearing, served petitioners

with their reports two days before the hearing, and petitioners' responsive reports were prepared and served on defendants during the hearing. Pretrial Stipulation dated September 5, 1984, Docket No. 366.[15]

At the hearing, experts differed sharply on every issue underlying the construction of the Treaty of Fort Stanwix, the Articles of Confederation, the 1783 Proclamation of Congress, and Congress' treaty-making authority at the time. Many of these differences, such as varying interpretations of the parties' course of conduct and their intentions at the Treaty of Fort Stanwix, are factual disputes, even though only issues of law may be decided on motions to dismiss or for summary judgment. *Conley v. Gibson*; F.R.C.P. 56(c).

The court of appeals noted that the cases were on appeal from dismissal for failure to state a claim, but did not address the applicable standards in disposing of the motions. Rather, the court of appeals simply handled the matter as if it were before it following trial on the merits. It implicitly placed the burden of proof on petitioners, assessed the relative weight of conflicting evidence, and ignored much of petitioners' evidence.

For example, the court of appeals determined that the defendants "have the better of the argument" on the

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[15] This truncated proceeding contrasts sharply with trials typically held on the meaning of Indian treaties. *See e.g.*, United States v. Washington, 387 F.Supp. 312 (W.D.Wash 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), where the court allowed elaborate pre-trial preparation and conducted a lengthy trial to construe treaties securing fishing rights, which proceeding was relied on by this Court in *Washington v. Fishing Vessel Ass'n.*

crucial issue of whether the right of pre-emption in 1784 included the power to extinguish Indian title. 860 F.2d at 1160. Yet, the court made no reference to significant parts of petitioners' evidence on that point, including two clear statements by committees of Congress[16], statements by contemporaries[17], and the 1790 Indian Trade and Intercourse Act.[18] In addition, the court of appeals appeared to acknowledge that states lacked authority simply to appropriate or annex by cession Indian lands (860 F.2d n.9), but failed to take into account petitioners' evidence

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[16] During the confederation period, North Carolina and Georgia also attempted to acquire Indian lands that had been set aside for tribes' use in federal treaties. On two occasions, committees of Congress considered whether Article IX, clause 4, authorized such action by the states and on both occasions the committee concluded that the states misconstrued the legislative right, or right of pre-emption, preserved for them in Article IX, clause 4, of the Articles of Confederation, as including authority to extinguish Indian title. Plaintiffs' exhibit numbered RH-24.

[17] For example, Henry Knox, as the first Secretary of War under the Constitution, said referring to confederation period Indian treaties: "That, although the right of Georgia to the pre-emption of said lands should be admitted in its full extent, yet, it is conceived, that should the said State, or any companies or persons, claiming under it, attempt to extinguish the Indian claims, unless authorized thereto by measure would be repugnant to the aforesaid treaties." Plaintiffs' exhibit numbered RH-44.

[18] In pertinent part, the 1790 statute reads: "That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under authority of the United States." Act of July 22, 1790, 1 Stat. 137.

that the state transactions in question were not arms length treaties, but coerced cessions. *See Oneida Indian Nation of New York v. United States*, 37 Ind. Cl. Comm. 522. Significantly, petitioners' evidence was the *only* evidence on this issue.

At other points in its analysis, the court of appeals acknowledged but rejected "arguable inferences" from the evidence supporting the Oneida claims (860 F.2d at 1155), recognized the ambiguity of key Articles of Confederation language (*Id.* at 1157), and observed that although there was evidence on both sides of an argument, the defendants' experts had the better of the dispute (*Id.* at 1160). The court of appeals' assessment of evidence and credibility of witnesses mirrors disposition after trial on the merits, even though petitioners have plainly not been given the opportunity to fully develop or present their case.

At this juncture, the record in these cases is obviously incomplete. Even on those issues already tried at the hearing, important sources of primary documents remain untapped by the parties. For example, private papers of key individuals have not been examined, including those of Richard Henry Lee and Charles Pinckney, who figured prominently in the drafting of the pertinent provisions of the Articles of Confederation, and those of private individuals who attended the Fort Stanwix negotiations as neutral observers. Other important sources, such as the Papers of the Continental Congress and Letters of Members of the Continental Congress, have only been sporadically researched as time limitations on the motions to dismiss proceedings allowed.

The court of appeals' disposition of important issues on the truncated proceeding held here violates both F.R.C.P. 12 and 56. *See Carter v. Stanton.* It is unclear whether it is ever proper to conduct an evidentiary hearing on a motion to dismiss for failure to state a claim, without converting the motion into one for summary judgment and giving adequate notice of such conversion to the parties and full opportunity to address the merits. But it is clear that if such a hearing is conducted it is plain error to resolve disputed issues of fact raised at the hearing on either a motion to dismiss or motion for summary judgment. *Id.; Scheuer v. Rhodes.* Lower courts should be given guidance by this Court on limitations respecting the use of evidentiary hearings in conjunction with motions to dismiss or for summary judgment.

CONCLUSION

These cases raise important issues that were wrongly decided by the court of appeals on motions to dismiss for failure to state a claim and without reference to relevant decisions of this Court. Fundamental tenets of federal Indian law and basic issues of federalism and federal procedure are at stake here. Petitioners urge this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

The ONEIDA INDIAN NATION OF NEW YORK, the Oneida Indian Nation of Wisconsin, Oneida of the Thames Band, et al., Plaintiffs-Appellants,

The Houdenosaunee, the Oneida Nation, the Onondaga Nation, the Mohawk Nation, the Seneca Nation, and the Tuscarora Nation, Plaintiffs-Intervenors-Appellants,

v.

STATE OF NEW YORK and Various State Agencies; Twelve New York Counties, Valentine Ryan, Individually and as Class Representative; St. Regis Paper Company, Individually and as Class Representative; Georgia Pacific Corporation, Individually and as Class Representative; and New York State Electric and Gas Corporation, Defendants-Appellees.

Nos. 1145, 1144 and 1146, dockets
86-9052, 86-9072 and 86-9074.

United States Court of Appeals,
Second Circuit.

Argued June 2, 1987.

Decided Oct. 31, 1988.

Indians brought action claiming title to lands acquired by the State of New York in 1785 and 1788. The District Court dismissed, 520 F.Supp. 1278. The Court of Appeals, 691 F.2d 1070 affirmed in part and reversed and remanded in part. A motion to intervene was denied, 102 F.R.D. 445, but the Court of Appeals reversed, 732 F.2d 261. The United States District Court for the Northern District of New York, Neal P. McCurn, Chief Judge, 649 F.Supp. 420, entered judgment dismissing claims, and Indians appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) Articles of Confederation empowered State of New York to make the purchases

without the consent of the Confederal Congress; (2) issue of whether the purchase would affect war and peace with Indians was not justiciable; (3) lands were within New York's borders at the time of purchase; (4) Treaty of Fort Stanwix did not prohibit the purchase; (5) purchase was not prohibited by resolution of the Confederal Congress; and (6) states' right of pre-emption during the confederal period included the right to extinguish Indian title.

Affirmed.

Arlinda Locklear, Washington, D.C. (Richard Dauphinais, Native American Rights Fund, Washington, D.C., Francis Skenandore, Oneida Tribal Law Office, Oneida, Wis., Norman Dorsen, N.Y.U. Law School, New York City, on the brief, for plaintiff-appellant Oneida Indian Nation of Wisconsin, Daan Braveman, Gary Kelder, Syracuse Univ. Law School. Syracuse, N.Y., on the brief, for plaintiff-appellant Oneida of the Thames Band, Bertram Hirsch, Floral Park, N.Y., on the brief, for plaintiff-appellant Oneida Indian Nation of New York), for plaintiffs-appellants.

Curtis G. Berkey, Washington, D.C. (Robert T. Coulter, Indian Law Resource Center, Washington, D.C., on the brief), for plaintiffs-intervenors-appellants Houdenosaunee & constituent nations.

Allan Van Gestel, Boston, Mass. (Jeffrey C. Bates, Goodwin, Procter & Hoar, Boston, Mass., on the brief, for defendants-appellees twelve New York counties & Ryan, Richard K. Hughes, Hiscock & Barclay, Syracuse, N.Y., on the brief, for defendants-appellees St. Regis Paper Co. &

Georgia Pacific Corp., Robert Abrams, Atty. Gen., Peter H. Schiff, Albany, N.Y., on the brief, for defendants-appellees State of N.Y. & various State Agencies; Howard M. Schmertz, Huber, Lawrence & Abell, New York City, on the brief, for defendant-appellee New York State Elec. & Gas Corp.), for defendants-appellees.

Before NEWMAN, KEARSE and WINTER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

This appeal requires consideration of the validity of two treaties under which New York purchased more than five million acres of land from the Oneida Indians in 1785 and 1788. The appeal is unusual because it requires a federal court, perhaps for the first time, to determine whether actions of a state violated the Articles of Confederation. These matters arise on an appeal by the Oneidas and other Indians from a judgment of the District Court for the Northern District of New York (Neal P. McCurn, Judge) dismissing their suit against the State of New York and others for recovery of the land and damages. The District Court dismissed the suit for failure to state a claim on which relief can be granted, after conducting an extensive hearing into the historical background of the relevant documents, as required by this Court's prior decision, *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070 (2d Cir.1982) (*Oneida I*). We agree with Judge McCurn that the treaties under which the land was acquired were not invalid under the Articles of Confederation, the Proclamation of 1783, or the 1784 Treaty of Fort Stanwix. We therefore affirm the judgment of the District Court.

Background

This litigation began in 1978. Suit was filed by the Oneida Indian Nation of New York and some of its members. 78 CV-104 (N.D.N.Y.). Defendants were the State of New York and several state agencies and state officials. A similar suit was filed in 1979 by the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band, a Canadian tribe located in Ontario. 79-CV-798 (N.D.N.Y.). The second suit named as defendants the State of New York, several state agencies and officials, and several counties, municipalities, and businesses located in the area that is the subject of the litigation. In 79-CV-798, a defendant class was certified consisting of approximately 60,000 individuals, businesses, and governmental entities and officials. Because of a tribal dispute over recognition of a governing body of the Oneidas of New York, the first suit remained somewhat inactive, and the litigation continued in the second suit, although both suits are the subject of the dispositive rulings now pending on appeal. Intervention in the second suit was subsequently granted to the Houdenosaunee, a confederacy of the six Iroquois Nations, and five of its constituent nations, the Oneida, Onondaga, Mohawk, Seneca, and Tuscarora Nations. *See Oneida Indian Nation of Wisconsin v. State of New York*, 732 F.2d 259 (2d Cir.1984). The sixth nation in the confederacy is the Cayuga Nation.

The subject of the litigation is a swath of land in central New York 50 to 60 miles wide, extending from New York's southern border with Pennsylvania to its northern border with Canada. The land comprises more than five and one-half million acres and encompasses portions of thirteen New York counties. New York

acquired the land as a result of two treaties it concluded with the Oneidas – the Treaty of Fort Herkimer, signed on June 23, 1785, and the Treaty of Fort Schuyler, signed on September 22, 1788. By the first treaty New York acquired 300,000 acres for $11,500 in goods and cash. By the second treaty New York acquired approximately five million acres for $5,500 in goods and cash, plus a payment of $600 per year. The annual payment obligation was capitalized and discharged by a lump-sum payment in 1839. N.Y. Laws ch. 518 (1839).

The plaintiffs challenged the validity of the two transactions on a number of grounds, of which only three have survived the prior appeal to concern us on the pending appeal: lack of consent by the Confederal Congress, alleged to be required by the Articles of Confederation, conflict with the 1784 Treaty of Fort Stanwix between the United States and the Six Nations, and conflict with the Proclamation of 1783, issued by the Confederal Congress. The District Court originally dismissed all of the claims for legal insufficiency in 1981. *Oneida Indian Nation of New York v. State of New York*, 520 F.Supp. 1278 (N.D.N.Y.1981).

On the first appeal we upheld much of what the District Court had decided. *Oneida I*. We upheld the rejection of New York's defenses of Eleventh Amendment immunity, *id.*, 691 F.2d at 1079-80, non-justiciability, *id.* at 1080-83, and untimeliness, *id.* at 1083-84. With respect to justiciability, we upheld the power of a federal court to determine in general Indian land rights based on Indian treaty or other federal law but did not focus specifically on issues of justiciability that might arise in the course of considering the merits of the particular claims advanced

by the plaintiffs. With respect to timeliness, we rejected the applicability of state statutes of limitations to the plaintiffs' federal law claims and also ruled that a time bar based on federal law was not applicable since the tribes should not be precluded in circumstances where the United States would be entitled to sue; the United States could sue for damages until December 31, 1982, on claims that accrued prior to July 18, 1966, *see* 28 U.S.C. § 2415(a), (b) (1982 & Supp. IV 1986), and could sue without any time limit to establish title or possession, *id.* § 2415(c). Though our prior opinion contained no discussion of a defense of laches, it stated in its conclusion that this defense was being rejected. *Oneida I*, 691 F.2d at 1097.[1]

Turning to the merits of the plaintiffs' claims, the panel in *Oneida I* upheld the District Court's rejection of the claim that the lands had been acquired by fraud, *id.* at 1096, and the claim that the 1788 transaction was a lease, creating a right of reversion that could not lawfully be

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[1] The writer accepts the prior panel's rejection of a laches defense as the law of the case, though would find the issue to be a substantial one if it were open. In *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), four Justices of the Supreme Court expressed the view in dissent that suits such as the pending one are barred by laches. *Id.* at 255, 105 S.Ct. at 1262 (Stevens, J., with whom Burger, C.J., and White and Rehnquist, JJ., concur, dissenting). The majority did not reach the laches defense on the ground that the issue had not been preserved in the Court of Appeals. *Id.* at 245, 105 S.Ct. at 1257. The majority observed in a footnote that application of the defense of laches to an action at law would be "novel." *Id.* at 244 n. 16, 105 S.Ct. at 1257 n. 16.

acquired without congressional consent after enactment of the first Nonintercourse Act, Act of July 22, 1790, 1 Stat. 137 (1845) (current version codified at 25 U.S.C. § 177 (1982). With these matters cleared away, the panel then focused on the issues at the heart of the current controversy. Ultimately the panel concluded that the claims based on the Articles of Confederation, the Treaty of Fort Stanwix, and the Proclamation of 1783 could not be resolved on a motion to dismiss under Fed.R.Civ.P. 12(b)(6) "without affording the plaintiffs an evidentiary hearing in order to clarify the meaning and context of [contemporaneous] statements relied on and the weight to be given to them." *Oneida I*, 691 F.2d at 1086. The case was remanded for such a hearing.

On remand, the District Court assembled a voluminous record, detailed examination of which has occasioned the delay in issuing this opinion. In live testimony, videotaped depositions, and written statements, several of the nation's foremost historians of the confederal period gave their views about the background and meaning of the key documents at issue in the litigation. Their statements were accompanied by hundreds of supporting documents, including the correspondence of the principal participants. In a scholarly and comprehensive opinion, Judge McCurn adhered to his previous decision, dismissing as legally insufficient all of the plaintiffs' remaining claims. *Oneida Indian Nation v. State of New York*, 649 F.Supp. 420 (N.D.N.Y.1986). We will set forth Judge McCurn's rulings with respect to each of the principal points at issue in the course of our consideration of the merits.

Discussion

I. The Rights Concerning Indian Lands

Under the so-called Doctrine of Discovery, long recognized by the Supreme Court, *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 543, 8 L.Ed. 483 (1832); *Johnson v. McIntosh*, 8 Wheat. (21 U.S.) 543, 573-74, 5 L.Ed. 681 (1823), the discovering nations held fee title to Indian land, subject to the Indians' right of occupancy and use. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 777, 39 L.Ed.2d 73 (1974). This distinction between fee title and the Indians' right of occupancy and use, sometimes called Indian title or aboriginal title, gave rise to a corresponding distinction between the rights to affect fee title and Indian title. The right to extinguish Indian title, sometimes called a right of extinguishment, was held by the sovereign – Great Britain in the period prior to the American Revolution. Whether this right was held by the United States or by the individual states during the confederal period is part of the pending controversy. Since the adoption of the Constitution, there has been broad agreement that the right of extinguishment belongs to the national government. *See Oneida Indian Nation v. County of Oneida, supra*, 414 U.S. at 667, 94 S.Ct. at 777. The right to purchase the fee title to Indian land is known as the right of preemption. Whether the right of preemption enjoyed by the states during the confederal period included the right of extinguishment is also part of the pending controversy.

II. The Claim Under the Articles of Confederation

Plaintiffs contend that under the Articles of Confederation the United States held the exclusive right of extinguishment of Indian title as to all Indian lands, both within and beyond the borders of the states. As a consequence, the argument continues, New York's acquisition of the disputed lands is invalid for lack of consent by the Confederal Congress. At a minimum, plaintiffs contend, Congress had the power to control the right of extinguishment in the exercise of its power to make peace treaties with the Indians and that, without consent of the Confederal Congress, no state could extinguish Indian title under circumstances that would interfere with congressional power to treat with the Indians on matters of war and peace.

Before examining these contentions, we pause to notice the jurisdictional conundrum posed for an Article III court by a claim alleging a violation of the Articles of Confederation. During the Confederation, there were no national courts authorized to adjudicate any issues arising generally under national law.[2] Though the Constitution established as the supreme law of the land all

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[2] The only permanent national court existing under the Confederation was the Court of Appeals in Cases of Capture, created by Congress in 1780 to hear appeals of prize cases from state courts exercising admiralty jurisdiction. *See* 17 Journals of the Continental Congress 458-59 (May 24, 1780); *Hart and Wechsler's the Federal Courts and the Federal System* 5 n. 18 (Bator et al. eds. 1973). This Court was created by the Confederal Congress under its Article IX(1) power to establish courts "for receiving and determining finally appeals in all cases of captures." *See Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 345,

(Continued on following page)

treaties previously made, U.S. Const. art. VI, cl. 2, it did not expressly incorporate, even for purposes of adjudicating antecedent disputes, the Articles of Confederation or statutes enacted by the Confederal Congress. With no national court available to adjudicate an Articles claim during the Confederation and no express incorporation of the preexisting Articles as binding law after the Confederation, how does an Article III court acquire jurisdiction over a claim arising under the Articles? The District Court, in its first decision in this litigation, had recognized the argument that federal jurisdiction was lacking for the claim under the Articles. 520 F.Supp. at 1291. The District Court ruled, however, that subject matter jurisdiction was plainly available for the claim arising under the Treaty of Fort Stanwix, incorporated as the supreme law of the land by the Constitution, *id.* n. 12, and concluded that the claim under the Articles was a pendent state law claim over which it elected to exercise jurisdiction under *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). 520 F.Supp. at 1291. Judge McCurn noted that New York had incorported the Articles into its statutes in 1778. *Id.* at 1291 n. 13.

One may wonder whether New York's incorporation of the Articles was only an act of adherence to the confederation or in addition was intended to render them

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4 L.Ed. 97 (1816). In addition, the Confederal Congress on one occasion used its Article IX(2) power to create a panel to adjudicate a land dispute between Connecticut and Pennsylvania concerning the territory along the Susquehanna River known as the Wyoming Valley. *See* 1 J. Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 188-93 (1971); *Hart & Wechsler, supra*, at 4 n. 17.

part of the positive law of the State, enforceable in its courts. Even if New York courts viewed the Articles as enforceable "state" law, one may wonder whether they would have ever upheld a claim alleging that the State of New York had violated the Articles by acting in conflict with unexercised power of Congress.[3] One may even speculate that state judges in the confederal period might have left such power struggles between the states and congress to adjustment through the non-judicial processes of government and through politics, perhaps inaugurating the political question doctrine.[4]

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[3] *Cf. Irvine v. Sims's Lessee,* 3 Dall. (3 U.S.) 425, 464, 1 L.Ed. 665 (1799) (Iredell, J., concurring) (doubting whether prior to the Constitution court could consider claim that state statute violated compact between two states).

[4] On at least one occasion during the Confederation a New York court decided a case in which it was claimed (by no less an advocate than Alexander Hamilton) that a New York statute was invalid because of a conflict with the Articles of Confederation. *Rutgers v. Waddington* (unreported) (Mayor's Court of New York City 1784), *summarized in* 1 J. Goebel, *supra,* at 132-34. The court was urged to conclude that the state statute, authorizing a trespass action for military occupation of private homes, was contrary to alleged releases effected by the Treaty of Paris, ending the war with Great Britain, and thereby interfered with Congress's authority under the Articles. The court appeared to accept the proposition that no state could alter the Confederation or a treaty of the United States, but ultimately decided the case by narrowly construing the state statute, in light of the law of nations, to deny any benefit to the claimant. *See* 1 J. Goebel, *supra,* 131-37.

In *Phelps v. Holker,* 1 Dall. (1 U.S.) 261, 1 L.Ed. 128 (Pa.Sup.Ct.1788), the Pennsylvania supreme Court construed the Articles as not including a full faith and credit obligation that would entitle a Massachusetts judgment to be conclusive evidence of a debt, enforceable in an *in rem* action in Pennsylvania. *Id.,* at 264 (Opinion of McKean, C.J.).

However we might resolve these doubts, we believe that the opinion of the prior panel in *Oneida I* established as the law of the case that jurisdiction exists for the claim based on the Articles and that this claim is justiciable, notwithstanding the fact that the dispute concerns the relative powers of Congress and a state under a governmental system that lacked a national judicial branch. On the prior appeal, we noted that the district Court had upheld subject matter jurisdiction, *Oneida I*, 691 F.2d at 1074. Since a reviewing court always has an obligation to satisfy itself of the existence of such jurisdiction, this may be deemed implicit approval of the District Court's jurisdictional ruling. As to justiciability, though the panel discussed only the general question of whether Indian land claims were justiciable, without explicit consideration of the justiciability of a claim based on the Articles, *id.* at 1080-83, the entirety of the panel's discussion of the merits was premised on the appropriateness of adjudicating that claim in the District Court. That was a principal reason for the remand. We therefore accept as the law of the case both subject matter jurisdiction over the Articles claim and its general justiciability, though, as we discuss below, one issue pertinent to that claim is not justiciable.

Apart from law of the case, we note that the Supreme Court has adjudicated a claim concerning title to Indian land ever though the challenged acquisitions occurred during the interval between the Declaration of Independence and the Constitution. *Johnson v. McIntosh, supra.* The former Court of Claims also adjudicated an Indian claim arising from a land transaction occurring during the Confederation. *Six Nations v. United States*, 173 Ct.Cl. 899 (1965). Rejecting a claim under section 2(5) of the

Indian Claims Commission Act, 25 U.S.C. § 70a(5) (1964) (repealed), the Court ruled that the Articles of Confederation did not establish a fiduciary relationship between the United States and the Six Nations with respect to lands within state borders. In *Penhallow v. Doane's Adm'rs*, 3 Dall. (3 U.S.) 54, 1 L.Ed. 507 (1795), the Supreme Court, in upholding the validity of a judgment entered during the confederal period by the Court of Appeals in Cases of Capture, adjudicated the validity of congressional action taken under the Articles and even action taken prior to their ratification.

A. The Context, Structure, and Text of the Articles of Confederation

We turn then to the merits of appellants' claim under the Articles, initially bearing in mind the relevant historical context.

The framing and ratification of the Articles of Confederation occurred against a background dominated by two overriding circumstances pertinent to the issues in this litigation. First, treaties of peace with both Great Britain and with the Six Nations of the Iroquois Confederacy had not yet been concluded. The Articles were submitted to the states in 1777 and ratified by Maryland, the last state to do so, in 1781. The Treaty of Paris, formally ending hostilities with Great Britain, was not signed until September 3, 1783, 8 Stat. 80 (1848), and the Treaty of Fort Stanwix, ending hostilities with the four Iroquois nations that had sided with the British – the Senecas, Mohawks, Onondagas, and Cayugas – and assuring protection to the two Iroquois nations that had

sided with the United States – the Oneidas and the Tuscaroras – was not signed until October 22, 1784. Second, there existed a major controversy between the so-called landed states – those claiming Western lands – and the so-called landless states – those without such claims. The landed states, New York, Connecticut, Massachusetts, Virginia, North Carolina, South Carolina, and Georgia, asserted their claims primarily on the basis of their colonial charters, except for New York, which based its claim on its one hundred year history of special relationship with the Six Nations. The landless states were New Hampshire, Rhode Island, New Jersey, Pennsylvania, Delaware, and Maryland. A dominant concern of the new national government was to limit the territory of the landed states to their traditional borders near the East Coast and secure for the United States the vast domain of land these states claimed westward to the Mississippi River, or even "to the South Sea," as stated in the colonial charters of Connecticut, Massachusetts, Virginia, North Carolina, South Carolina, and Georgia. Ultimately the new government was successful, as the landed states ceded "their" Western lands to the United States, often in exchange for recognition of favorable boundaries for their traditional areas of state jurisdiction.

It is in the context of these great issues of war and land that the fledgling national government undertook to determine the allocation of authority between the nation and the states on diverse matters, of which none was more contentious than Indian affairs. The close relationship between the evolution of the Articles of Confederation and resolution of the Western lands issue is vividly

illustrated by the instructions of Maryland to her delegates not to agree to the Articles until matters concerning the Western lands had been settled. *See* U.S. C.A. Art. of Confed., Historical Notes 15 (1987).

The fundamental structure of the Articles is one of limited delegation of powers to the national government with reservation to the states of all powers not delegated. Article II provides:

> Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

The Necessary and Proper Clause, which played such a significant part in the shaping of federal powers under the Constitution, *see McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819), was absent from the Articles of Confederation.

Two clauses of Article IX set forth the delegated powers pertinent to the pending litigation. Article IX(1) provides:

> The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article. . . .

Article IX(4) provides:

> The United States in congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated. . . .

The extent to which the authority of Congress was limited by the phrase "not members of any of the States" and by the Legislative Rights Proviso are major issues of dispute in this litigation.

Two clauses limiting the authority of the states are relevant to the pending issues. Article VI(1) provides:

> No State without the consent of the United States in Congress assembled, shall . . . enter into any conference, agreement, alliance or treaty with any king, prince or foreign state. . . .

Article VI(5) provides:

> No State shall engage in any war without the consent of the United State in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States Congress assembled can be consulted. . . .

B. The Source of National Power to Make Peace Treaties with the Indians

A fundamental issue that divides the parties is whether federal power to make peace treaties with the Indians derives from Article IX(1) or Article IX(4). The dispute is important because the plaintiffs, relying on clause 1, contend that the national power to make peace treaties with the Indians included the power to extinguish Indian title, whereas the defendants, relying on clause 4, contend that the national power to make treaties with the Indians in the course of "managing all affairs" with them was subject to the Legislative Rights Proviso in that clause, a proviso the defendants contend confirmed

state authority to extinguish Indian title to lands within state borders. As a fallback position, the defendants also contend that, even if Indian peace treaty power derives from clause 1, that power is nonetheless modified by the Legislative Rights Proviso of clause 4.

The District Court resolved this dispute in favor of the plaintiffs but with a qualification that results, in effect, in a victory for the defendants. Judge McCurn first concluded that "the plain language of clause 1 indicates that congress had clause 1 authority over Indians." 649 F.Supp. at 434. He then stated that Congress' power to make treaties with the Indians was exclusive only with respect to treaties of war and peace, *id.* at 435; with respect to treaties to purchase land, he concluded that the states had such power under clause 4 by virtue of the Legislative Rights Proviso and that this Proviso included the right to purchase Indian land and extinguish Indian title without consent of the Confederal Congress, *id.* at 434.

Though we reach the same ultimate conclusion, we travel a different analytical route. We do not agree with Judge McCurn that clause 1 conveyed to the Confederal Congress exclusive power to make only certain kinds of treaties with the Indians. The plain language of clause 1 indicated to us that whatever power was there contained was indivisible. We see no basis for reading clause 1 to give Congress exclusive power to make some treaties with the Indians, leaving the states with power to make other treaties with them. As we read clause 1, it has no application to Indians. Instead, we read clause 4, with its grant of national power to manage "all affairs" with the Indians, to grant the Confederal Congress the power to

make any treaties with the Indians – on war and peace and on other subjects such as land acquisitions. The clause 4 power, however, was subject to the Legislative Rights Proviso, and we read this Proviso to reflect the same distinction Judge McCurn read into clause 1. The Proviso was not a grant to the states of an indivisible array of powers. We conclude that it did not give the states any power to make treaties of war and peace with the Indians (such power belonging exclusively to Congress under clause 4), but that it did give the states the power to purchase Indian land within their borders and extinguish Indian title to such land so long as such activity did not interfere with Congress's paramount powers over war and peace with the Indians.

Our reasons for reaching these conclusions start with the text of the pertinent provisions. Clause 1 grouped Congress's exclusive power to make treaties with its exclusive power to send and receive ambassadors. The grant of such exclusive powers was complemented by the denial to the states in Article VI(1) of the power, without consent of Congress, to make any treaty or to exchange embassies with "any king, prince or state." In none of the contemporaneous materials were the Indian nations or their leaders referred to as a "king, prince or state." This phrase plainly applied to foreign nations. It was to these nations, not Indian "nations," that the United States sent ambassadors, and it was with these nations that the United States could make treaties under clause 1. The Supreme Court has referred to the Indian tribes as "domestic dependent nations" in concluding that they are not "foreign states" within the meaning of section 2 of

Article II of the Constitution. *See Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1, 17, 8 L.Ed. 25 (1831).

A further consideration, based on both the text of the Articles and contemporanous practice, concerns ratification. Article IX(6) prohibited the United States from entering into "any treaties or alliances . . . unless nine States assent to the same." During the confederal period, treaties between the United States and Indian nations were not submitted to the states for ratification. In particular, the Treaty of Fort Stanwix, which plaintiffs rely on in this litigation as an exercise of Congress' authority under Article IX(1), became effective when it was signed. Congress did not submit it for ratification but merely directed that the Treaty be published and transmitted to the states. 28 Journals of the Continental Congress 423-26, 430 (June 6, 1785) [hereinafter cited as "JCC"]. Treaties authorized by clause 1 of Article IX were those that required ratification as provided in clause 6. By not submitting Indian treaties for ratification, the negotiators and the Confederal Congress to which they reported indicated their contemporaneous understanding that such treaties were authorized by clause 4 as part of "managing all affairs with the Indians," rather than by clause 1.[5]

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[5] Interestingly, one of the first proposals made by President Washington to the first congress under the Constitution was that Indian treaties should henceforth be submitted to the Senate for ratification in the same manner as treaties with European nations. 1 *Messages and Papers of the Presidents* 61-62 (Sept. 17, 1789).

A further textual consideration arises from the fact that although Article IX(1) included treaties of "commerce," Article IX(4) expressly covered "trade" with the Indians, further indicating that the powers of Article IX(1) were those relating to foreign countries, not domestic Indian nations.

Plaintiffs contend that in one respect the text of the Articles supports their reading of Article IX(1). They rely on the provision of Article VI(5), which exempted the states from the prohibition against engaging in war without the consent of Congress when there is imminent danger of invasion by "some nation of Indians." Since an exception for threat of invasion by Indians was contained in the article generally restricting the states' powers concerning war and peace and since this exception was expressly referred to in Article IX(1), plaintiffs argue that matters concerning war and peace with the Indians must have fallen within Article IX(1)'s grant of exclusive authority to Congress over war and peace. Though the argument found favor with the District Court, 649 F.Supp. at 434-35, we are not persuaded. Article VI(5) simply recognized that threat of invasion by Indians justified an exception to what would otherwise have been exclusive power in Congress over matters of war and peace, but it sheds no light on whether such power, with respect to Indians, was conferred by clause 1 or clause 4 of Article IX. The reference to the exception in Article IX(1) lends some support to an inference that clause 1 was the source of authority for Indian treaties, but this arguable inference is insufficient to overcome the contrary textual considerations.

Contemporaneous understanding of the legislators who had framed the Articles of Confederation further supports our conclusion. On several occasions, committees of the Confederal Congress filing reports concerning their investigations of Indian affairs on matters of war and peace explicitly referred to Article IX(4) as the source of their authority and made no mention of Article IX(1). *See, e.g.*, 33 JCC 454, 458 (Aug. 3, 1787); 25 JCC 680-93 (Oct 15, 1783). The report filed on October 15, 1783, by the committee investigating Indian affairs in the Southern Department explicitly referred to the authority of Congress to make peace treaties with the Indians and relied upon Article IX(4). Especially pertinent is the April 21, 1783, resolution of a committee of congress reporting on steps to end hostilities with the Indians and to prepare for peace treaties. Reciting the source of congressional authority, the resolution relied on the Article IX(4) power of "managing all affairs with the Indians" and made no mention of Article IX(1). 24 JCC 264 (Apr. 21, 1783). In this regard it is also notable that the Proclamation of 1783, a broad exercise of national authority over Indian affairs, which we consider below, expressly referred to the language of Article IX(4) as the source of authority for the Proclamation, and made no mention of Article IX(1). Proclamation of 1783, *reprinted in* 25 JCC 602 (Sept. 22, 1783).

We do not doubt that treaties made during the confederal period between the United States and Indian nations are entitled to the same respect as treaties made with foreign nations and that both equally became "the supreme Law of the Land" by virtue of Article VI of the Constitution. *See Worcester v. Georgia, supra*, 6 Pet. at 559.

We conclude only that Congress's power to make Indian treaties derived from Article IX(4).

C. National and State Authority Under Article IX(4)

1. *Evolution of Article IX(4).* Examination of the evolution and contemporaneous understanding of clause 4 of Article IX confirms our conclusion that national authority to make treaties with the Indians derived from this clause and also sheds significant light on the respective powers of the national government and the states in Indian matters, particularly in regard to the purchase of Indian lands. The first draft of the Articles of Confederation, prepared by Benjamin Franklin in 1775, would have given Congress complete and exclusive authority over Indian affairs. Only Congress could purchase Indian land. 2 JCC 195-99 (July 21, 1775). Franklin's draft was not submitted to Congress.

The draft that served as the basis for amendment and ultimate adoption was prepared by John Dickinson. *See* 5 JCC 546-54 (July 12, 1776). The Dickinson draft submitted to Congress on July 12, 1776, gave Congress "the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians." Dickinson Draft of Articles of Confederation art. XVIII, 5 JCC 550 (July 12, 1776). This draft also dealt specifically with state authority to purchase Indian lands. In a provision more narrow than Franklin's draft, Dickinson's draft provided that no person or colony could purchase Indian land until state boundaries were determined, and Congress was given power to set such boundaries. Once the boundaries were determined, only Congress could purchase Indian

land *outside* such boundaries. The plain implication was that after the boundaries were fixed, states could purchase Indian lands *inside* their boundaries. *Id.* art. XIV.

During the summer of 1776, a Committee of the Whole modified the Dickinson draft. The Committee's version, reported to congress on August 20, 1776, deleted Article XIV from Dickinson's draft, eliminating even the prohibition on the authority of colonies to purchase Indian lands prior to ascertainment of state boundaries. The grant of exclusive power to congress of "regulating the trade, and managing all affairs with the Indians," contained in renumbered Article XIV, was now modified to apply only to Indians "not members of any of the States." Committee Draft of Articles of Confederation art. XIV, 5 JCC 682 (Aug. 20, 1776).

Debate on the Articles languished until 1777 and did not resume on the clauses concerning Indian lands until October 1777. On October 27, two amendments were offered to the draft article granting Congress power over Indian affairs. The first, evidently offered by those interested in limiting national power, would have deleted the phrase "not members of any of the states" and substituted "not residing within the limits of any of the United States." 9 JCC 844 (Oct. 27, 1777). This amendment would have narrowed national power to Indians living outside the territorial limits of the states. The second amendment, evidently offered by those interested in broadening national power, would have rewritten the entire grant of power to Congress to read: "managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits

wherein a particular State claims, and actually exercises jurisdiction." *Id.*

Two aspects of this second amendment are significant. First, it showed that those endeavoring to broaden national power, the landless states, wanted national authority over trade with the Indians to apply even to Indians within a state's limits under circumstances where a state was not "actually exercis[ing] jurisdiction." Second, it showed that even those seeking to broaden national power assumed that the phrase "managing all affairs with the Indians" included the power to deal with matters of war and peace with the Indians. The proponents of this amendment, in seeking broader national authority over Indian trade than over Indian war and peace matters, left the latter topic in what became Article IX(4); they did not bother to suggest any modification of the provisions that became Article IX(1) because they understood that the issues of war, peace, and treaties that were dealt with in those provisions concerned only relations with foreign countries.

The following day, October 28, the Congress, without explanation but evidently in a spirit of compromise, rejected both of the pending amendments and decided instead to leave the wording of the grant of national power respecting Indian affairs unchanged but to add the words of the Legislative rights Proviso: "provided, that the legislative right of any State within its own limits be not infringed or violated." *Id.* at 845.[6] Thus, the somewhat ambiguous "not members" phrase was retained

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[6] The amendment contains a comma after the work "State," which was omitted in the Articles as finally adopted. The omission appears to have no significance.

without either expansion or contraction, but a broad protection of state authority was expressly inserted, a protection of authority within a state's "limits," not merely within areas over which it was "actually exercis[ing] jurisdiction."

In two respects the evolution of Article IX(4) is especially pertinent to the pending controversy. First, the process that began with Franklin's draft and ended with the Articles as adopted represents a gradual victory for the landed states, which were seeking to curtail national power over Indian affairs. It would be inconsistent with this pattern of diminishing national power to find in the Articles an implicit prohibition barring the states from purchasing Indian land within their borders without the approval of Congress. Second, the contention that the exclusive Article IX(1) power of congress to make treaties comprehends Indian treaties and thereby precludes state treaties to purchase Indian lands is refuted by the meticulous attention the Congress gave to Article IX(4). In the struggle between the states seeking to expand national power over Indian affairs and those seeking to narrow such power, all the attention was focused on the provisions that became Article IX(4). There was no controversy about the meaning of the national treaty power in Article IX(1). The entire debate over Article IX(4) would have to be ignored to conclude that while the landed states were winning their fight to refine Article IX(4) to their liking, there was always implicit in Article IX(1) a broad grant of exclusive national power that precluded by negative implication state purchases of Indian land within state borders.

Once it is understood that the allocation of power respecting all Indian affairs is governed solely by Article IX(4), there can be little doubt, as the preceding discussion has foreshadowed, that clause 4 confirmed the right of the states to purchase Indian lands within their borders without the consent of Congress, at least under circumstances that did not interfere with the war and peace powers of the Congress. Though the terms of Clause 4 have properly been characterized as "ambiguous," *Worcester v. Georgia, supra,* 6 Pet. at 559 (1832), and even "obscure and contradictory," *The Federalist* No. 42, at 334 (J. Madison) (J. Cooke ed. 1961), the fundamental purpose and meaning of the Legislative Rights Proviso is clear in this respect.

In construing Article IX(4), we will assume without deciding that the District Court was correct in accepting appellants' contention that the "not members" phrase applied to Indians, such as those of the Six Nations, who were not assimilated into the body politic of any state, though located within its territorial limits. 649 F.Supp. at 431-32. Even if that is so, we agree with the District Court that the Legislative Rights Proviso confirmed the authority of the states to purchase Indian land within its borders without securing congressional consent. *Id.* at 433-35. Though the text of Article IX(4) does not settle the matter one way or the other, the contemporaneous materials examined by the District Court provide a firm basis for the Court's conclusion.

2. *Contemporaneous Understanding of Article IX(4).* Prominent among the contemporaneous materials surveyed by Judge McCurn is the correspondence between

James Monroe and James Madison specifically discussing whether New York's claimed right to purchase Indian lands conflicted with the Articles of Confederation. In response to Monroe's query, Madison candidly recognized that Article IX(4) was ambiguous since the Legislative Rights Proviso, if "taken in its full latitude," would "destroy" the authority of Congress. Letter from James Madison to James Monroe (Nov. 27, 1784), *reprinted in II The Writings of James Madison* 91 (Hunt ed. 1901). Endorsing an interpretation that endeavored to harmonize the Proviso with the grant of national regulatory power, Madison concluded that the Proviso guaranteed the states the right to purchase Indian land.[7] Specifically referring to the relationship between New York's proposed purchase and the national government's Treaty of Fort Stanwix, he said that "as far as N.Y. may claim a right of treating with the Indians for the purchase of

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[7] Madison set out four reasons for his conclusion:

> 1. That this was the principal right formerly exerted by the Colonies with regard to the Indians. 2. that it was a right asserted by the laws as well as the proceedings of all of them, and therefore being most familiar, wd. be most likely to be in contemplation of the Parties; 3. that being of most consequence to the States individually, and least inconsistent with the general powers of Congress, it was most likely to be made a ground of Compromise. 4. it has always been said that the proviso came from the Virga. Delegates, who wd naturally be most vigilant over the territorial rights of their Constituents.

II *The Writings of James Madison, supra,* at 91-92.

lands within her limits, she has the confederation on her side."[8] *Id.*

One somewhat equivocal indication of contemporaneous understanding is the resolution adopted by the Confederal Congress in 1783 in response to Pennsylvania's notification of its intention to make a treaty with the Indians for the purchase of land within the state's acknowledged borders. The Pennsylvania General Assembly had broached to Congress the topic of a land purchase in a carefully worded resolution that invited Congress to express its views but did not acknowledge the power of Congress to withhold consent. The resolution made clear Pennsylvania's view that "the Articles of Confederation do not by any means explicitly restrict [the Pennsylvania General Assembly] from entering on this business [of a purchase of Indian land] independent of Congress," yet sought the "sense of the Congress" concerning the purchase "being deeply impressed with the delicacy of touching any subject of federal relation, but with the most deliberate caution; and as the letter of a clause in the ninth section [Article IX(4)] appears to involve a doubt. . . ." 25 JCC 594 (Sept. 20, 1783).

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[8] Madison continued with the observation that "as far as she [New York] may have exerted that right [to purchase Indian land] in contravention of the Gen. Treaty [of Fort Stanwix] . . . , she has violated both duty and decorum." Madison expressed no view on whether New York's proposed purchase would violate the Treaty. It appears from this and other correspondence that he had not become aware of the terms of the Treaty at the time he wrote to Monroe. We consider this issue in part III, *infra*.

The committee of Congress considering the matter recommended advising Pennsylvania that Congress had no objection "provided no engagements relative to peace or war with the said Indians, be entered into by the said State, the power of holding treaties on this subject being vested by the Confederation solely in the United States in Congress assembled." *Id.* at 591. Though that view of national and state authority is consistent with our conclusions, the emphasis on national authority was evidently worded too strongly for the landed states, most of which joined together in defeating this version of the committee's resolution. After considerable attempts to find acceptable language, Congress ultimately adopted a far more innocuous resolution, stating only that the federal commissioners who were about to meet with the Indians to conclude a peace treaty should give notice to Pennsylvania of the time and place of holding the treaty "to the end, that the persons to be appointed by [Pennsylvania], for purchasing lands within the limits thereof, at the expence of the said State, may attend for the sole purpose of making such purchase, at the time and place appointed for holding the said treaty." 25 JCC 767 (Oct. 30, 1783). Then, in lieu of the original language that had endeavored to describe the exclusive area of national authority, the resolution added that the United States commissioners are instructed to give "every assistance in their power" to the Pennsylvania negotiators "towards promoting the interest of that State, as far as the same may consist with the general interest of the Union." *Id.*

Appellants draw from this episode the conclusion that Pennsylvania acknowledged the need to secure the approval of Congress for the land purchase. We think the

episode lends greater support to the position of the appellees. Pennsylvania was careful to maintain its position that the Articles did not authorize Congress to bar the State's purchase. Significantly, Congress expressed no contrary view. Even the draft resolution emphasizing exclusive national power only over matters of war and peace was thought too strong and was rejected in favor of a more generally worded version that referred vaguely to the "general interest of the Union."

More probative and strongly supportive of the appellees' position are the circumstances of Congress's reaction to New York's plans to undertake what ultimately became the first of the two purchases challenged in this litigation. During the course of congressional debate on resolutions of instruction to the federal commissioners who would negotiate the Treaty of Fort Stanwix, a resolution was offered concerning a then pending New York plan to distribute to its soldiers some of the land New York was endeavoring to appropriate from the Onondagas and the Cayugas, tribes that had sided with the British during the Revolution. The resolution would have instructed that if the planned distribution "may so far irritate the Indians, as to expose these United States to the dangers and calamities of an Indian War," the federal commissioners were to report the difficulties to the New York legislature and "in such case, it is earnestly recommended to the legislature of New York, to revise the laws by which such appropriations have been made. . . ." 25 JCC 642 (Oct. 3, 1783). Even this mild proposal was too strongly worded for New York and other landed states, and it was defeated. But it is powerful evidence that even as to a land acquisition that might lead to war with the

Indians, Congress believed it had only the power to *recommend* that a state desist, not the power to withhold a consent necessary for such acquisition.

Further indication of the absence of national power to disapprove state Indian land purchases under the Confederation are the pertinent views expressed concerning the changed circumstances under the Constitution. Among the most well-known statements is the December 29, 1790, reply of President Washington to Corn Planter, Chief of the Senecas, who had complained about state purchases of Indian lands. Washington pointed out that these purchases had occurred before the adoption of the Constitution and added, "But the Case is now entirely altered. The General Government only has the Power to treat with the Indian Nations, . . . No State, nor Person, can purchase your Lands, unless at a general Treaty, held under the Authority of the United States." *Proceedings of the Commissioners of Indian Affairs* 166 n. 1 (Hough ed. 1861).

Thomas Jefferson, writing an official opinion as Secretary of State, expressed a similar view on May 3, 1790:

> There are but two means of acquiring the native title. First, war; for even war may, sometimes, give a just title. Second, contracts or treaty.
>
> The States of America before their present union possessed completely, each within its own limits, the exclusive right to use these two means of acquiring the native title, and by their act of union, they have as completely ceded both to the general government.

3 *The Writings of Thomas Jefferson* 19 (Lipscomb et al. eds. 1904).[9]

In 1832, Chief Justice Marshall also recognized the significant change. In reviewing the evolution of national power over over Indian affairs, he noted the uncertainties created by the Legislative Rights Proviso in Article IX(4) and then observed that the "correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. . . . [The new government's powers over Indian affairs] are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded." *Worcester v. Georgia, supra*, 6 Pet. at 559.

In concluding as we do that during the confederal period the states had authority to purchase Indian land

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[9] Jefferson subsequently expressed a view that appears to contradict his 1790 opinion. In a letter to the Secretary of War on August 10, 1791, Jefferson wrote:

> [N]either under the present constitution, nor the ancient confederation, had any State or person a right to treat with the Indians, without the consent of the General Government.

8 *The Writings of Thomas Jefferson, supra*, at 227. The apparent contradiction was plausibly explained in testimony to the trial court by pointing out that the 1790 opinion was affirming the states' right to acquire Indian land by purchase, whereas the 1791 opinion was concerned with the attempt by Georgia to appropriate Indian land by cession. The very next words of Jefferson's 1791 opinion add:

> that that consent has never been given to any treaty for the cession of lands in question. . . .

Id.

within their borders without the need of congressional consent, we accept an important proposition advanced by the appellees concerning the meaning of "preemption" during this period - namely, that this right of the states included the right to extinguish Indian title. After the Constitution, when the United States acquired plenary power over Indian affairs without the "shackles" of the Legislative Rights Proviso of Article IX(4), it is clear that the national government held the right of extinguishment of Indian title to all lands then owned by the Indians. But during the confederation, we are satisfied, after examination of the extensive materials presented to the trial court, that the historians who testified that the right of preemption enjoyed by the states then included the right of extinguishment have the better of the argument.

When Madison wrote his significant letter to Monroe on November 27, 1784, and set forth his reasons for construing the Legislative Rights Proviso to accord New York the right to purchase Indian land, he summarized the purport of the Proviso by saying that "it was to save to the States their right of preemption of lands from the Indians." *II The Writings of James Madison, supra,* at 91. It would have made no sense to argue so carefully the case in support of New York's right to make the purchase if Madison had meant that New York could acquire only fee title, leaving the Indians with Indian title that only the United States could extinguish. Significantly, one of the reasons Madison advanced for his interpretation favoring New York was that the right of preemption had previously been asserted by New York and many other states. Clearly, these states had been asserting a right to obtain complete title to Indian lands within their borders, not a

partial right that left them subject to the assent of the national government.

Jefferson's opinion of May 3, 1790, written when he was Secretary of State, also recognized that the rights of a state were broader before the Constitution. Advising with respect to Georgia's attempt to convey land obtained from Indians, he said:

> Georgia, *possessing the exclusive right to acquire the native title*, but having relinquished the means of doing it to the national government, can only have put her grantee into her own condition. She could convey to them the exclusive right to acquire; but she could not convey what she had not herself, that is, the means of acquiring.

3 *The Writings of Thomas Jefferson*, *supra*, at 20 (emphasis in original).

Marshall recognized the same point in *Johnson v. McIntosh*, *supra*. In recounting the development of the rights of discovering nations with respect to Indian lands, he observed:

> It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty [ending the war with Great Britain], subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested *in that government which might constitutionally exercise it*.

8 Wheat. at 584-85 (emphasis added). It should be noted that Marshall was careful not to claim for the United States alone a right to extinguish Indian title, no doubt recognizing that the United States held such right as to Western lands but that the states held such right as to

lands within their acknowledged borders. Marshall then considered the nature of Virginia's rights with respect to the particular parcels at issue in *Johnson*, land within the borders of Virginia that had been purchased by a private citizen from Indians in 1773 and 1775. After quoting Virginia's assertion in legislation passed in 1779 of the State's " 'exclusive right of preemption from the Indians, of all the lands within the limits of her own chartered territory,' " the Chief Justice concluded, "[I]t may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government." *Id.* Having previously recognized that the right to extinguish Indian title was in "that government which might constitutionally exercise it," Marshall (and Virginia) were necessarily using "preemption" to include the right of extinguishment.

We conclude that the Article IX(4) power of Congress to manage Indian Affairs, as limited by the Legislative Rights Proviso, did not preclude New York from making the 1785 and 1788 purchases of Oneida land within its borders.

D. Inherent Right of External Sovereignty

If exclusive national power to extinguish Indian title during the Confederation with respect to lands within state borders was not supportable by Article IX(1) or Article IX(4), appellants contend that such power arose from the United States' inherent right of external sovereignty. This argument relies on the analysis of external

sovereignty set forth by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

Curtiss-Wright involved a challenge to the validity of a presidential proclamation barring the sale of arms to Bolivia, a nation then engaged in war in the Chaco. The proclamation was challenged on the ground that the joint resolution of Congress under which it issued was an unconstitutionally broad delegation of power. The Court rejected the challenge, concluding that the delegation objection was not valid with respect to the President's conduct of the foreign relations of the United States. In reaching this conclusion, the court articulated the principle of external sovereignty. The Court reasoned that "international powers," *id.* at 316, 57 S.Ct. at 219, were never possessed by the colonies and therefore could not have been transferred by the newly established states to the national government when the nation was created. Such powers, being an attribute of sovereignty under the law of nations, were deemed to pass directly to the United States at the instant of independence from Great Britain. *Id.* Though the Court's opinion is concerned with national and especially presidential power under the Constitution, it is clear that Justice Sutherland believed that the scope of "international powers" was equally extensive during the period between the Declaration of Independence and the Constitution:

> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.

Id. Some of the historians who testified in the trial court in this litigation advanced strong arguments for doubting the correctness of this proposition, but we are obliged to take our instruction as the Supreme Court gives it.[10]

Accepting the principle that the national government possessed inherent powers of external sovereignty during the confederal period, we nevertheless reject appellants' claim that the existence of such powers precluded the states from acquiring Indian title to land within their borders without the consent of Congress. First, we do not agree with the premise of appellants' argument that the powers of external sovereignty included authority over all purchases of Indian land. Indeed, we have considerable doubt whether the "international powers" discussed in *Curtiss-Wright* included any authority with respect to Indians. The whole tenor of the Court's discussion concerns international relations, the very matters that during the Confederation were the subject of the powers enumerated in Article IX(1), which did not include Indian affairs. We recognize, however, that Indian affairs do not fall neatly into the category of either international or domestic matters, and it is surely arguable that on matters concerning war and peace with the Indians, the national government did possess the inherent powers that *Curtiss-Wright* ascribed to the national government in the realm of traditionally "international" matters. But

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[10] Even if the powers of external sovereignty flowed directly to the national government at the moment of independence, there is considerable basis for believing that the national government itself redistributed some of these powers to the states in establishing the scheme of government prevailing under the Articles of Confederation.

even if this is so, it is far too extravagant an extension of the concept of external sovereignty to maintain that it includes authority over *all* purchases of Indian land. To whatever extent external sovereignty entitled the Confederal Congress to treat with the Indians on matters of war and peace, it did not vest the United States with a right of extinguishment with respect to land acquisitions by the state that did not implicate those matters.

Appellants appear to suggest, however, that New York's 1785 and 1788 purchases of Oneida lands did implicate issues of war and peace by posing a threat to the peace with the Six Nations that resulted from the Treaty of Fort Stanwix. This suggestion raises a question of justiciability that was not considered in *Oneida I* - whether a federal court may invalidate a state purchase of Indian land on the ground that the purchase posed a threat to peace with the Indians. This issue arises with respect to both appellants' claim based on external sovereignty and their claim, considered below, based on the Treaty of Fort Stanwix.

Even under the Constitution, with federal courts authorized by statute to decide questions arising under federal law, including treaties, it is clear that many questions concerning peace and war are not appropriate for determination by the Judicial Branch. The Supreme Court declared more than a century ago, for example, that the determination of the end of hostilities requires reference "to some public act of the political departments of the government to fix the dates." *The Protector*, 12 Wall. (79 U.S.), 700, 702, 20 L.Ed. 463 (1871). Previously the Court disclaimed authority to adjudicate the correctness of a decision of the President determining the existence of

sufficiently "imminent danger of invasion" to warrant calling forth state militias. *Martin v. Mott*, 12 Wheat. (25 U.S.) 19, 6 L.Ed. 537 (1827). It may well be, as the Court has also indicated, that some issues concerning the existence of hostilities may not require deference to the decisions of the political branches, *see Baker v. Carr*, 369 U.S. 186, 211-12, 82 S.Ct. 691, 706-07, 7 L.Ed.2d 663 (1962); *Woods v. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 424, 92 L.Ed. 596 (1948). But it would be an extraordinary assertion of judicial authority under the Constitution for a federal court to determine whether action of a state posed a sufficient threat to peace to warrant invalidation because of conflict with inherent national power arising from external sovereignty. We think it likely that a federal court would disclaim such authority unless acting at the request of the United States in a lawsuit authorized by statute. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). If under the Constitution an Article III court could probably not, in the absence of a statute, deem justiciable the issue of whether a state land purchase imperiled the peace, it surely cannot do so when the challenge to the purchase arises under the Articles of Confederation. Thus, to the extent that the appellants' external sovereignty argument would require us to determine whether New York's land purchases in 1785 and 1788 posed a threat to peace with the Indians, we conclude that this issue is not justiciable.

Our second reason for rejecting the external sovereignty argument proceeds from the explicit recognition in *Curtiss-Wright* that the inherent power there recognized "like every other governmental power, must be exercised

in subordination to the applicable provisions of the Constitution." 299 U.S. at 320, 57 S.Ct. at 221. That limiting principle must have been equally applicable to whatever inherent powers the national government possessed under the Confederation. If anything, it had more force prior to the establishment of the "more perfect Union." As we have earlier concluded, the organic law of the Confederation included in Article IX(4) a reservation of right to the States that enabled them to purchase Indian land within their borders and thereby to extinguish Indian title. Even an expansive reading of *Curtiss-Wright* does not support inherent national authority that may override this limitation.

III. The Claim Under the Treaty of Fort Stanwix

Appellants contend that the Treaty of Fort Stanwix prohibited New York's purchases of Oneida land without the consent of the Confederal Congress. Before turning to the specifics of this contention, we note that it encounters the general objection, set forth above, that the national government lacked the power to impose such a limitation on New York's right to purchase Indian land within its borders. We acknowledge, however, that there is plausible basis for recognizing power in the Confederal Congress to prohibit those state purchases that would imperil peace with the Indians, and to some extent appellants contend that the challenged New York purchases posed at least a threat to the peace secured by the Treaty of Fort Stanwix. Even this aspect of the claim encounters a serious objection. To whatever extent Congress's power on matters of war and peace with the Indians included authority to bar state purchases that imperiled peace with

the Indians, we have the same concern about adjudicating challenges to the exercise of that power in a treaty as we previously expressed with respect to challenges to the exercise of inherent power arising from external sovereignty: At least in the absence of a statute authorizing federal court adjudication, it would have been up to Congress, not the judiciary, to determine that a particular state purchase posed a sufficient threat to peace to warrant invalidation. It is arguable, however, and perhaps this is appellants' point, that in authorizing and approving the Treaty of Fort Stanwix, Congress itself was making the determination that state purchases of Oneida lands would imperil peace with the Indians and for that reason would be prohibited in the absence of the consent of Congress. We will assume that Congress had the power to make such a determination and to implement it with such a prohibition, thereby removing from judicial scrutiny the issue of whether state purchases would imperil the peace. Nevertheless, we agree with the District Court that the treaty does not contain the prohibition for which the appellants contend.[11]

The textual basis for appellants' claim is Article II, which provides in its entirety:

> The Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled.

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[11] In view of this conclusion, we do not reach the argument, on which appellants' Treaty claim is premised, that the Treaty represents a determination by Congress that purchases of Oneida land would imperil the peace.

Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15 (1846) (Treaty at Fort Stanwix). Manifestly this provision does not say in terms that the Oneidas may not sell their lands to New York without the consent of Congress. Despite the absence of any explicit language to that effect, the appellants contend that the Treaty should be construed to contain such a limitation. They rely on cases holding that Indian treaties are to be broadly construed in favor of the Indians. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979); *Antoine v. Washington*, 420 U.S. 194, 199-200, 95 S.Ct. 944, 948, 43 L.Ed.2d 129 (1975). We will construe the Treaty with this principle in mind, examining the context in which the provision at issue appears and what can be gleaned concerning its contemporaneous understanding at the time of the negotiations.

Before turning to that task, we note three considerations that weigh heavily against the interpretation urged by the appellants. First, to read into the Treaty a general prohibition against land sales to states without approval of Congress would endow the Confederal Congress with authority to override the Legislative Rights Proviso of Article IX(4) by treaty. Under the Constitution, the treaty power cannot override constitutional limitations respecting individual rights. *Reid v. Covert*, 354 U.S. 1, 16-17, 77 S.Ct. 1222, 1230, 1 L.Ed.2d 1148 (1957) (plurality opinion), though the relation of this power to state prerogatives is less certain, *see Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920). It is highly doubtful that under the Articles of Confederation the reconciliation of national power and state prerogatives was subject to

adjustment in favor of national power simply by the use of national treaties. Second, the rule of generous construction has not been applied to divest a state of land it has acquired. On the contrary, the Supreme Court has cautioned that such a construction is not warranted "unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question." *United States v. Minnesota*, 270 U.S. 181, 209, 46 S.Ct. 298, 306, 70 L.Ed. 539 (1926). Third, though the construction urged by the Oneidas would now inure to their benefit, it surely which not have been to their benefit at the time of the Treaty if their right to be secured in the possession of their lands carried with it a perpetual limitation on their right to sell portions of their lands.

The placement of Article II within the Treaty of Fort Stanwix is instructive. This article is one of four operative provisions of the Treaty, all of which are placed after the following introductory language:

> The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:
>
> . . . .

Treaty of Fort Stanwix, *supra*, 7 Stat. at 15. Thus, the context of Article II suggests that the guarantee to the Oneidas to be secured in the possession of their lands protected them against interference by the four hostile Iroquois Nations that had sided with the British, and had nothing to do with limiting lands sales to New York. This understanding of Article II is borne out by the statement of the federal commissioners at the concluding session of the negotiations on October 23, 1784. Speaking first to the

four hostile nations, they said, "We have buried the hatchet, not only between the United States and you, but also *between our friendly Indians the Oneidas*, Tuscaroras, Mohickans and Cognewashas *and yourselves.*" Minutes of the proceedings at Fort Stanwix in 1784, Wayne Manuscripts, Indian Treaties 1778 to 1795, B (Historical Society of Pennsylvania) [hereinafter "Wayne MSS"] (emphasis added). Then, speaking directly to the Oneidas and the Tuscaroras, the federal commissioners continued:

> Congress has not forget your fidelity and attachment. They would not have made war with the hostile tribes, without securing your interest but such a peace is now concluded *with them* as is perfectly agreeable *to you*. Now you may embrace the last hostile tribes as your brothers who have come home to you again after a long and anxious absence.

Id. (emphasis added).

The evolution of the Treaty, from its origins to the authorization for its publication, supports the appellees' view of its meaning. As Commander-in-Chief, George Washington set forth his views as to the nature and purposes of a treaty with the Six Nations in his September 7, 1783, letter to James Duane, the chairman of the committee of Congress appointed to confer with him. Washington urged that a treaty should be negotiated, establishing a boundary line for the lands of the Six Nations. He cautioned that private entrepreneurs should not be permitted to purchase Indian land, but recognized that land sales to government would occur: "[T]he Indians . . . will ever retreat as our Settlements advance upon them and they will be as ready to sell, as we are to buy." 27 *The Writings of George Washington* 136 (Fitzpatrick ed.

1938). Then, focusing precisely on the issue that has come to dominate this litigation, he added:

> No purchase under any pretense whatever should be made by any other authority than that of the Sovereign power, *or the Legislature of the State in which such lands may happen to be.*

Id. at 137 (emphasis added).

The following month Congress adopted the report of its Committee for Indian Affairs for the Northern and Middle Districts and appointed commissioners to negotiate with the Six Nations. Significantly, the report included an instruction to the commissioners to "reassure" the Oneidas and the Tuscaroras

> that they may rely that the lands which they claim as their inheritance will be reserved for their sole use and benefit *until they may think it for their own advantage to dispose of the same.*

25 JCC 687 (Oct. 15, 1783) (emphasis added). In adopting the report, Congress specifically provided that the authorization for a treaty with the Six Nations "shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits." *Id.* at 693.

The notes of one of the Treaty commissioners, Richard Butler, reflect his understanding, just two days before the Treaty was agreed to, that the commissioners were to assure the Oneidas and Tuscaroras that they may "rely on the lands which they claim . . . till they think fit to dispose of them." Richard Butler's Notes on the Treaty of Fort Stanwix (Oct. 18, 1784), *Richard Butler Papers*, 3 Frontier Wars Papers (Series U) 290, Lyman Draper Manuscripts (State Historical Society of Wisconsin).

When Congress received the Treaty and ordered it published, it adopted language offered by Melancton Smith, a delegate from New York, declaring that "no purchases, which have been or hereafter may be made from the Indians, at any treaties held or to be held with them, of their right to soil *within the limits of any state*, can, ought, or shall be considered as interfering with the right of any such state to the jurisdiction or soil." 28 JCC 426 (June 3, 1785).

There is one aspect of the Treaty negotiations that arguably lends support to the appellants' position, but, understood in context, it is insufficient to overcome the contrary evidence. On two occasions the federal treaty commissioners spoke to the leaders of the Six Nations concerning the exclusivity of federal authority. Appellants view these remarks as conveying to the Indians the understanding that all sales of Indian land would require the approval of Congress. Appellees interpret the remarks as indicating only that the federal commissioners had the exclusive authority to negotiate on matters of peace. The first statement was made on October 12, 1784, at the opening of the treaty negotiations. One of the federal commissioners said:

> [W]e also tell you that we have full authority to transact all business between the United States, and you, and that without the authority of Congress no business can be valid that may be attempted by particular people or States.

II *The Olden Time* 407 (Craig ed. 1846). On October 12, 1784, the Indians were told "not to listen to any overtures made to you by any person or body of men or by any particular State not authorized by Congress." Wayne

MSS, *supra*. A Mohawk chief, Aaron Hill, responded on October 17 in remarks that left the ambiguity unresolved:

> You directed us not to attend to what any particular state might say to us on public business, for that the commissioners or Congress alone were adequate to the purpose.

Id.

The unsuccessful efforts of New York to negotiate a peace treaty with the Six Nations earlier in 1784 makes it clear that the references in these remarks are to state negotiations over peace, not purchase of land. In March 1783, the New York legislature had formulated a plan to end hostilities with the Six Nations under an arrangement whereby New York would displace the Senecas, the Onondagas, and the Cayugas from the lands they claimed within New York's borders and then negotiate with the Oneidas to exchange their land for land previously owned by the Senecas. H.S. Manley, *The Treaty of Fort Stanwix* 28-29 (1932). The legislature instructed its Indian commissioners to negotiate with the Oneidas. New York's plan aroused serious concern in Congress that New York's attempt to negotiate peace with the Six Nations by removing some of the tribes from New York's borders would precipitate hostilities. Undaunted, New York's Governor Clinton in April 1784 invited the Mohawks, Onondagas, Cayugas, and Senecas to a meeting to adjust all differences between them, the Oneidas and the Tuscaroras, and New York. A meeting was set for August at Fort Stanwix. Governor Clinton and the New York Indian commissioners met first with the Oneidas and Tuscaroras, assuring them of their friendship. Then, meeting with the four hostile nations, the New York

delegation sought to obtain an outright cession of their lands within New York's borders. This demand was refused, and New York's attempt to consummate a separate peace ended in failure.

It was this episode that prompted the remarks of the federal commissioners to the Six Nations at Fort Stanwix later in the fall of 1784. In a letter to the President of the Confederal Congress on October 5, 1784, just two days after the first remarks relied on by the appellants, the federal commissioners, writing from Fort Stanwix, gave this report of what had occurred:

> Tho we gave due information to the Governor of his State of the time & place of holding the treaty, that if he had any business to transact with the Indians he might do it under the patronage of the U.S. But he chose to hold a treaty with the Six Nations before us, & we are told *endeavored to make peace with them* in the name of this State. . . . [W]e thought proper to inform the Indians in our conference, that a treaty with an individual State without the sanction of Congress could be of no validity.

Papers of the Continental Congress, National Archives Microfilm Publications, Microcopy No. M-247, roll 69, p. 133 (emphasis added). Aaron Hill, the Mohawk Chief, also had the abortive New York treaty efforts in mind when on October 17 he acknowledged the advice of the federal commissioners not to deal with a state on "public business":

> We of the Six Nations are fully sensible of the truth of this and we think that no particular State can have a right to treat separately, but that it belongs only to the United States. In consequence of this when the Governor of New York sent a message to us, to assemble us here in order to treat with that

> State, we requested that it might be a continental treaty as we perceived that the United States formed one general plan.

Wayne MSS, *supra*.

Appellants contend that all of this evidence at least raises a question whether the Indians understood the federal commissioners to be assuring them that approval of Congress was needed not only for state peace treaties but also for state land purchases. Furthermore, they argue, "[h]ow the words of the treaty were understood by [the Indians] rather than their critical meaning, should form the rule of construction," *Worcester v. Georgia*, *supra*, 6 Pet. at 582 (McLean, J., concurring), and that ambiguities should be resolved in favor of the Indians, *Winters v. United States*, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908). We agree with these principles but conclude that they do not support the appellants' contention. What are sought to be construed in favor of the appellants are not ambiguous terms of a treaty but ambiguous statements made in the course of negotiating a treaty. If ambiguities in such remarks always required resolution in favor of alleged understandings on the part of Indians, there would be virtually no limit to how far Indian treaties would be extended. We are satisfied, as was Judge McCurn, that the evidence assembled in the District Court does not show that the Six Nations were told that ordinary land purchases by New York, separate from negotiation of a peace treaty, required approval of Congress. Indeed, one of the clearest indications that the Oneidas had no such understanding is their readiness to make the first of the two sales challenged in this litigation, a sale made without congressional assent just eight

months after the Treaty of Fort Stanwix. In any event, we also agree that Article II of the Treaty, securing the Oneidas in the possession of their land, would have to be not merely construed but virtually rewritten to prohibit them from selling their land to New York without the approval of Congress. The Treaty claim was properly rejected.

IV. The Claim Under the Proclamation of 1783

On September 22, 1783, the Confederal Congress issued a proclamation prohibiting

> all persons from making settlements on lands inhabited or claimed by Indians, *without the limits or jurisdiction of any particular State*, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled. . . .

25 JCC 602 (Sept. 22, 1783) (emphasis added). Both sides agree that the Proclamation of 1783 prohibited purchases, without assent of Congress, of Indian lands *outside* the borders of the States. Appellants contend that the Proclamation applied, in addition, to land *within* state borders occupied by unassimilated Indians. They further contend that even if the Proclamation applied only to land beyond state borders, the land purchased by New York in 1785 was not at that time within the fixed limits of New York. The District Court rejected this claim, as do we.

The terms of the Proclamation appear to defeat the appellants' claim, though there is a plausible textual argument in their favor. The operative words of the Proclamation appear to prohibit purchases of Indian lands "without the limits or jurisdiction of any particular State." Appellants contend, however, that the quoted

phrase modifies its immediate antecedent "Indians" and not "lands," which appears five words earlier. There is a rule of construction that qualifying phrases are "generally" to be applied to words "immediately precedent" and not to others "more remote." *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir.1985). For several reasons, however, it is clear that the phrase modifies the word "lands."

First, the Proclamation recites that it is adopted pursuant to the authority of Article IX(4); the Legislative Rights Proviso is quoted in full. Since Congress did not have the power to prohibit all purchases of Indian land within state borders, it should not be understood to have attempted to do so in the Proclamation.

Second, the preliminary draft of the Proclamation placed the phrase "within the United States and without the boundaries of any particular State" immediately adjacent to the word "lands," 24 JCC 505-06 (Aug. 13, 1783), and there is no indication that the rearrangement of wording was intended to effect any substantive change, much less the significant change urged by the appellants.

Third, contemporaneous correspondence of the delegates indicates that they understood the Proclamation to apply only to lands outside the borders of a state. *See, e.g.*, Letter of the Virginia Delegates to Governor Benjamin Harrison (Oct. 4, 1783), *reprinted in* 7 *The Papers of James Madison* 367 (Rutland et al. eds. 1962). There can be no doubt that an effort to issue a proclamation barring state purchases of Indian lands *within* state borders would have set off a storm of protest within the Confederal Congress. As it happened, the Proclamation was a relatively non-controversial matter.

As a final argument, the appellants contend that even if the Proclamation applied only to land within state borders, New York's 1785 purchase violated the Proclamation because the acquired lands were not at that time within the borders of New York. But, as the District Court concluded, based on abundant contemporaneous documentation and maps. New York's cession of its claimed Western lands fixing New York's Western boundary was complete in 1782, and the lands purchased in 1785 were well to the east of that Western boundary. *See Massachusetts v. New York*, 271 U.S. 65, 81, 46 S.Ct. 357, 358, 70 L.Ed. 838 (1926). The fact that Massachusetts's lingering dispute with New York concerning the boundary was not resolved (in New York's favor) until the Treaty of Hartford on December 11, 1786, does not detract from the conclusion that the purchased land was within New York's borders in 1785.

Conclusion

The historical evidence indicates that the Articles of Confederation, the 1784 Treaty of Fort Stanwix, and the Proclamation of 1783 are properly construed not to prohibit, or require the assent of Congress for, New York's 1785 and 1788 purchases of Indian land from the Oneidas. The appellants' claims were properly dismissed by the District Court as legally insufficient, and the judgment of the District Court is affirmed.

ONEIDA INDIAN NATION OF NEW YORK, et al., Plaintiffs,

v.

STATE OF NEW YORK, et al., Defendants.

ONEIDA INDIAN NATION OF WISCONSIN, et al., Plaintiffs,

v.

The STATE OF NEW YORK, et al., Defendants.

Nos. 78-CV-104, 79-CV-798.

United States District Court, N.D. New York.

Nov. 19, 1986.

As Amended Dec. 10, 1986.

Descendants and successors-in-interest to Oneida Indian Nation brought action claiming title to and right to possess approximately 6,000,000 acres of land in central New York, basing their claim on aboriginal title confirmed by United States treaty. The United States District Court for the Northern District of New York, 520 F.Supp. 1278, dismissed, and Indian descendants and successors-in-interest appealed. The Court of Appeals, 691 F.2d 1070, affirmed in part and revered and remanded in part. On remand, the District Court, McCurn, J., held that Congress had neither authority under Articles of Confederation nor intent to prohibit states from purchasing Indian land located within their boundaries when Congress entered into the Treaty of Fort Stanwix and issued the

Proclamation of 1783 and, therefore, New York had right to purchase land in question.

Dismissed.

Native American Rights Fund, Washington, D.C., for plaintiff Oneida Indian Nation of Wisconsin; Arlinda Locklear, Francis Skenadore, Oneida, Wis., of counsel.

Daan Braveman, Gary T. Kelder, Syracuse, N.Y., for plaintiff Oneida of the Thames Band.

Bertram Hirsch, Floral Park, N.Y., for Oneida Indian Nation of New York.

Indian Law Resources Center, Washington, D.C., for plaintiff-intervenors, The Houdenosaunee and certain Constituent Nations; Robert Coulter, Curtis Berkey, of counsel.

Goodwin Proctor & Hoar, Boston, Mass., Hiscock & Barclay, Syracuse, N.Y., Sherman & Sterling, Huber Lawrence & Abell, New York City, Robert Abrams, Atty. Gen., State of N.Y., Albany, N.Y., for defendants; Allan van Gestel, Jeffrey C. Bates, Boston, Mass., Richard Hughes, Syracuse, N.Y., Arnold Bauman, David Marks, Howard Schmertz, New York City, David Robert, Asst. Atty. Gen., Albany, N.Y., of counsel.

MEMORANDUM-DECISION & ORDER

McCURN, District Judge.

Plaintiffs and plaintiff-intervenors in the present actions are the descendants and successors-in-interest to

the Oneida Indian Nation (Oneidas). They claim title to and the right to possess approximately six million acres of land in central New York. Plaintiffs base their claim on aboriginal title confirmed by United States treaty. The land at issue extends in a fifty to sixty mile wide strip from the Canadian border to the Pennsylvania border. The Oneidas sold the land in question to New York State in two treaties, the Treaty of Fort Herkimer in 1785 and the Treaty of Fort Schuyler in 1788. Both treaties were concluded before the United States Constitution[1] and the Indian Trade and Intercourse Act (Nonintercourse Act)[2] were enacted while the Articles of Confederation were in effect. Plaintiffs claim that the 1785 and 1788 treaties with New York are invalid under the Proclamation of 1783, and the Treaty of Fort Stanwix in 1784 between the United States government and the Six Nations Iroquois Confederacy.[3]

Defendants' motions to dismiss are presently before the court on remand from the Second Circuit. In the Fall

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[1] Article I, section 8 cl. 3 of the United States Constitution provides in part, "The Congress shall have power (t)o regulate Commerce . . . with the Indian Tribes."

[2] The Indian Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33 § 4, 1 Stat. 137, more commonly known as the Nonintercourse Act, and its subsequent amendments forbid the sale of Indian lands without the federal government's approval. The present Nonintercourse Act is codified at 25 U.S.C. § 177.

[3] The facts of these actions are set forth in detail in the court's earlier decision *Oneida Indian Nation of New York v. State of New York*, 520 F.Supp. 1278 (N.D.N.Y.1981), *aff'd in part and rev'd in part*, 691 F.2d 1070 (2d Cir.1982). Familiarity with the court's prior decision is assumed.

of 1984, the court held an evidentiary hearing on the meaning of the Articles of Confederation and the treaties at issue pursuant to the Second Circuit's instructions in *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070 (2d Cir.1982). After carefully considering the evidence submitted in connection with the evidentiary hearing, including the testimony and reports of the parties' experts, primary and secondary source documentation, the history of the period, the parties' arguments, and the relevant case law, the court grants defendants' motions.

BACKGROUND

Plaintiffs in 78-CV-104 are the Oneida Indian Nation of New York and several of its members. They claim to be the direct matrilineal descendants of the aboriginal Oneida Indian Nation. The New York Oneidas filed their complaint on March 3, 1978, against New York State; the State Thruway Authority; various state agencies, departments, and officials; and a proposed defendant class. An amended complaint was filed on July 3, 1980. Plaintiffs in 78-CV-104 have not moved to certify the defendant class.

Plaintiffs in 79-CV-798 are the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band, a Canadian tribe. They also claim to be the direct successors-in-interest to the original Oneidas. The complaint in 79-CV-798 was filed on December 5, 1979, against a proposed defendant class, New York State, various state agencies and officials, the counties and municipalities within the claim area, several businesses, and numerous individual landowners. On March 4, 1980, the court certified a defendant class consisting of all persons who claim

an interest in any portion of the subject land described in plaintiffs' complaint, with the exception of individual Oneida Indians and persons who occupy the land as a principal place of residence to the extent of the residence and two surrounding acres. *Oneida Indian Nation of Wisconsin v. State of New York*, 85 F.R.D. 701 (N.D.N.Y.1980). The court estimates that the defendant class includes approximately 60,000 individuals, businesses, and governmental entities. In 1984, the Houdenosaunee, also known as the Six Nations Iroquois Confederacy, intervened as plaintiffs. *Oneida Indian Nation of Wisconsin v. State of New York*, 732 F.2d 261 (2d Cir.1984). On February 3, 1985, the Thames Band filed an amended complaint aligning their claims with the Houdenosaunee's claims.

Plaintiffs in both actions contend that the United States government guaranteed the Oneidas possession of their land in the Proclamation of September 22, 1783, and the Treaty of Fort Stanwix in 1784. They argue that the 1783 Proclamation and the Fort Stanwix Treaty were valid exercises of the central government's authority under the Articles of Confederation and/or the government's "external sovereignty" powers. According to plaintiffs, the Treaty of Fort Herkimer in 1785 and the Treaty of Fort Schuyler in 1788 between the Oneidas and New York State are void because the central government did not consent to the transfer of Oneida land to New York.

Plaintiffs seek a declaration that they are the owners of and have the right to possess the land in question.[4]

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[4] In the alternative, plaintiffs claim that the 1788 Treaty was a lease arrangement. If the court refuses to declare the

(Continued on following page)

They also demand possession of the land claimed, the fair rental value of the land for the period of dispossession, costs, and attorneys' fees. In addition, plaintiffs in 78-CV-104 claim interest on the fair market rental value, the tolls that the New York Thruway has collected for passage over Oneida land during plaintiffs' dispossession, and a declaration of plaintiffs' hunting and fishing rights under the 1788 Treaty if the Treaty is not void.

By Memorandum-Decision and Order dated July 24, 1981, and amended on September 10, 1981, the court granted defendants' motions to dismiss in both actions. The court held that plaintiffs had standing to challenge the 1785 and 1788 Treaties, the action did not present a nonjusticiable political question, and the Eleventh Amendment did not bar plaintiffs' actions. However, the court held that plaintiffs failed to state a claim upon which relief could be granted because under the Articles of Confederation, the states had not effectively delegated to the central government their authority to extinguish Indian title within the states' respective boundaries. Consequently, Congress did not have the authority to forbid the states from forming treaties to extinguish title to Indian land within the states' borders. The court also found that New York's conduct did not create a constructive trust, the court could not inquire into the justness of the state's actions, and the Indians did not retain any

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(Continued from previous page)

1788 Treaty void, plaintiffs seek a declaration that they have a reversionary or beneficial interest in the land conveyed and an order directing the State to perform its obligations under the Treaty. The Second Circuit has affirmed this court's holding that the 1788 Treaty was a sale and not a lease. *Oneida Indian Nation of New York*, 691 F.2d at 1096.

rights protected under the Nonintercourse Act even if the 1788 Treaty created a perpetual lease. *Oneida Indian Nation of New York v. State of New York*, 520 F.Supp. 1278 (N.D.N.Y.1981).

The Second Circuit affirmed in part and reversed in part. It agreed with this court's determination on standing, justiciability, the Eleventh Amendment, and plaintiffs' rights under the Nonintercourse Act. However, the Second Circuit remanded the present actions with instructions to hold an evidentiary hearing on the meaning of the Articles of Confederation and the treaties at issue. *Oneida Indian Nation of New York*, 691 F.2d 1070.

Pursuant to the Second Circuit's instructions, this court formulated the following issues for reconsideration at the evidentiary hearing:

> (a) Whether Article IX cl. 1 of the Articles of Confederation included the power to make treaties with Indian tribes, and whether the Fort Stanwix Treaty was a valid exercise of those powers and was therefore binding on New York State. *See* 691 F.2d at 1086-91.
>
> (b) Whether the Article IX cl. 1 powers of Congress are limited by the qualified power of Congress under cl. 4, to manage Indian affairs. *See* 691 F.2d at 1091-92.
>
> (c) Whether the Fort Stanwix Treaty of 1784 precluded New York State from unilaterally extinguishing Indian title to tribal land located within its borders. *See* 691 F.2d at 1092-93.
>
> (d) Whether the Proclamation of 1783 was authorized by Article IX, cl. 4, and whether it was meant to protect the lands of all non-assimilated Indians, or merely those Indians upon lands outside state borders. *See* 691 F.2d at 1093-95.

Oneida Indian Nation of New York, Nos. 78-CV-104, 79-CV-798 at 4-5 (N.D.N.Y. Oct. 10, 1983) (Prehearing Order).

The evidentiary hearing was held from September 19, 1984, through October 11, 1984. The parties presented historians, political scientists, and an anthropologist as experts on the confederal period and Indian relations. In addition to their hearing testimony, the experts submitted reports supported by primary and secondary sources. Defendants' motions to dismiss are again ready for determination. The following constitutes the court's decision.

DISCUSSION

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-59, 8 L.Ed. 483 (1832), Chief Justice John Marshall left unanswered the question of whether the individual states had the power to extinguish Indian title during the confederal period. The present motions require the court to answer this question. The court's inquiry begins by examining the unique and often troubling legal relationship between the United States and the Indian nations within its borders.

A. *The Doctrine of Discovery*

Plaintiffs' claim to the land is based on aboriginal title. Aboriginal title is governed by the Doctrine of Discovery, a legal fiction which the Supreme Court developed in the early 1800s. The Court created the Doctrine of Discovery to reflect European policy toward the American Indians and to explain the discovering nations and the native Americans' legal rights to native land. *See e. g.*

Worcester, 6 Pet. 515, 31 U.S. 515; *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823). The doctrine provides that the "discovering nations held fee title to (the natives') lands, subject to the Indians' right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). *See Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 777, 39 L.Ed.2d 73 (1974). In *McIntosh*, Chief Justice Marshall explained:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subject, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. . . . Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to

> complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil, at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees subject only to the Indian right of occupancy.

McIntosh, 8 Wheat. at 572-74, 21 U.S. at 572-74.

Under the Doctrine of Discovery the discovering nation, in the present actions Great Britain, had fee title to Indian land which was good against all other discovering nations. The Indian tribes had the right to occupy and use the land. This right is generally known as aboriginal or Indian title. The tribe's right of occupancy could only be extinguished by the sovereign's purchase or conquest.

The right to acquire Indian land once Indian title has been extinguished is called the right of preemption. Generally, the rights of extinguishment and preemption are joined. However, they are separate powers and need not be held by the same entity. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810). *See Oneida Indian Nation of New York State*, 414 U.S. at 667, 94 S.Ct. at 777.

Before the American Revolution Great Britain, as the sovereign, held the right to extinguish Indian title and the right of preemption. Initially, Great Britain allowed the individual colonies to purchase Indian land and

extinguish Indian title within their charter limits. However, widespread encroachment on Indian land, mismanagement of Indian trade, and hostilities with the French created the need for a centralized Indian policy, particularly for acquiring Indian land. Horseman, Ex. 1, p. 1.[5] On October 7, 1763, Great Britain issued a proclamation which prohibited the colonies from purchasing Indian land or trading with the Indians without the Crown's authority. The Crown appointed two "Superintendents of Indian Affairs" to regulate dealings with the Indians and prohibited white settlement west of the Appalachians. Proclamation of 1763 (Oct. 7, 1763), *reprinted in* 3 W. Washburn, *The American Indian and the United States* 2135-39 (1973), Ex. D2, X I. Great Britain thus retained and exercised both the right to extinguish Indian title and the right of preemption just before the colonies declared their independence.

During the pre-revolutionary period, the colonies were expanding their settlements and trying to consolidate their charter land claims. They saw the Proclamation of 1763 and Great Britain's centralization of Indian affairs as an attempt to give favored traders and land speculators western lands to the colonies' detriment. Like the Stamp Act and Quartering Act, the colonists considered

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[5] In this opinion the hearing exhibits are cited Ex. ___ and the hearing transcript Tr. ___. The parties' experts are indicated by their surnames. The experts' written opinions were introduced into the hearing record as exhibits. The above citation therefore refers to Professor Horseman's written opinion which is Hearing Exhibit 1. The primary source documents attached as exhibits to the experts' written opinions are cited Ex. ___ X ___.

the Proclamation of 1763 an unwarranted intrusion into colonial affairs. Great Britain's centralization of Indian affairs eventually became one of the grievances which led to the American Revolution. Ketchum, Ex. D2, p. 1; Tr. pp. 0521-22, 0556-57.

B. *Source of Congress' Authority During the Confederal Period*

Before the Articles of Confederation were ratified, Congress acted as a revolutionary government. As such, it does not fit neatly into the legal theories of sovereignty. Although it is generally believed that Great Britain's sovereign powers passed to the individual colonies when the colonies declared their independence, the Supreme Court has recognized that certain external sovereign powers vested in the central government.

> As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency – namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-17, 57 S.Ct. 216, 219, 81 L.Ed. 255 (1936).

During the pre-confederal period, and even before the states had enacted their individual constitutions, Congress controlled foreign affairs and matters of war

and peace. As noted above, the United States in Congress assembled declared independence from Great Britain, made alliances with foreign nations, and established an army and navy. Congress also dealt with the Indian nations, at least in matters concerning war and peace. Horsman, Ex. 1, pp. 7-8. It established Indian departments to handle Indian affairs and to advise Congress. At the beginning of the conflict with Great Britain, Congress sent the Six Nations Iroquois Confederacy a request to remain neutral. Speech to the Six Nations, II *Journals of the Continental Congress* 177, 182 (July 13, 1775), Ex. 2, X 10. *See also* Resolution to Seek Indian Neutrality, X *Journals of the Continental Congress* 110-11 (Feb. 2, 1778), Ex. 2, X 17. When the Senecas, Mohawks, Onondagas, and Cayugas allied with Great Britain, congress enlisted the Oneida and Tuscaroras' help and waged war against the hostile tribes.

The fact that Congress had certain powers of external sovereignty during the preconfederal period, whether directly from Great Britain or indirectly from the colonies' implied consent, does not mean, however, that fee title to Indian land and the right to extinguish Indian title passed to congress. The Supreme Court has stated in dicta:

> It is true the United States never held fee title to Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State. . . .

Oneida Indian Nation of New York State, 414 U.S. at 670, 94 S.Ct. at 778.[6] *See also Fletcher*, 6 Cranch at 141-42, 10 U.S. at 141-42; *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 625 (2d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3124, 69 L.Ed.2d 981 (1981); Horsman, Tr. 1016-17 (powers of pre-emption and extinguishment "melded" in the states prior to Articles of Confederation).

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[6] The above quote is part of the Supreme Court's discussion of the federal government's exclusive right to extinguish Indian title under the Constitution and Nonintercourse Act. The Court begins its discussion by stating:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign – first the discovering European nation and later the original States and the United States – a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law.

Oneida Indian Nation of New York State, 414 U.S. at 667, 94 S.Ct. at 777. The full text of the above quote provides:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

Id. at 670, 94 S.Ct. at 778.

The treaties at issue in the present actions were signed after the Articles of Confederation were ratified. The authority to govern in this country has always come ultimately from the people by either an express or implied grant. *See Penhallow v. Doane's Administrators*, 3 U.S. (3 Dallas) 54, 80, 103, 109, 1 L.Ed. 507 (1795); *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 231-32, 1 L.Ed. 568 (1796); Declaration of Independence (July 4, 1776), *reprinted in* U.S.C.A. Const. Art. 1 § 1 – Art. 1 § 8 cl. 3. (stating, "That to secure these rights [life, liberty and the pursuit of happiness], Governments are instituted among Men, deriving their just powers from the consent of the governed. . . ."); Art. of Confed., art. XIII, *reprinted in* U.S.C.A. Const. Art. 1 § 1 – Art. 1 § 8 cl. 3, Ex. D2 X 4 (signatory clause stating, "Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union. . . ."); Faulkner, Ex. C, pp. 35-37; Rakove, Ex. E2, pp. 15-16; Scigliano, Ex. B, pp. 5-7. No matter what congress' powers were before the Articles of Confederation, the Articles' ratification redefined the central government, essentially creating a new government. The court must therefore look to the Articles of Confederation to determine what powers congress possessed.

C. *Allocation of Power under the Articles of Confederation*

Although interpreting the Articles of Confederation is more difficult than contemporary statutory construction because of the passage of time, the approach is the

same. To determine the Articles' meaning the court must examine the Articles' language, the legislative history, the interpretations that the period's statesmen and historical experts have given the Articles, how the Articles were applied, the period's general history, and relevant secondary sources.

The colonies attempted to establish a unique form of government under the Articles of Confederation. Their rebellion against Great Britain was a rebellion against too much central government. Preserving the individual states' rights was therefore extremely important to the congressional delegates. However, they also realized that thirteen separate governments could not effectively wage war against a major European power or gain recognition from the European community. The thirteen states needed to function as a single unit in foreign relations and matters of war and peace. The framers of the Articles of Confederation attempted to create a nation where the individual states retained power over internal affairs and the central government had power over external affairs, including foreign relations and war and peace. Rakove, Ex. E2, p. 17.

Having just thrown off too much central government, however, the individual states were not about to give the new government too much power, even in external matters. They tended to retain authority over essential areas necessary for the central government to effectively exercise its delegated power. For example, the United States in Congress assembled was given exclusive power over war and peace, but the states retained the power of taxation. Art. of Confed., art. VIII cl. 2. Congress also had

exclusive power to form treaties and alliances with foreign nations, but commerce treaties could not prohibit the states from imposing "imposts and duties on foreigners" or "prohibiting the exportation or importation of any species of goods or commodities whatsoever." Art. of Confed., art. IX cl. 1. As a result, congress often lacked essential enforcement powers, and the states tended to pursue their own interests to the detriment of the whole. Eventually, the United States was forced to create a new government with greater centralized powers "in order to form a more perfect union."

Article II of the Articles of Confederation provides for the general allocation of powers and reflects the congressional delegates' desire to protect the states' rights. Article II provides:

> Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Art. of Confed., art. II. Congress thus possessed only those powers which the Articles of Confederation expressly delegated to it. Lerner, Ex. A, p. 23; Tr. 96.

> Article XIII of the Articles provides: Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be

> afterwards confirmed by the Legislatures of every State.[7]

Plaintiffs argue that Article XIII functions as a supremacy clause. Defendants disagree. Defendants' expert Professor Rakove maintains that Article XIII is merely wishful thinking. The Second Circuit, however, has held that the central government's lack of power to enforce its authority under the Articles is irrelevant. *Oneida Indian Nation of New York*, 691 F.2d at 1095 n. 21. Although the confederal government was a sovereign entity of expressly limited powers, its powers would have been a nullity if the individual states' authority superceded congress' authority in those areas expressly delegated to the central government. Accordingly, Article XIII made congress' authority over its expressly delegated powers paramount to the states' authority.[8] *See* Lerner, Tr. 104 (conceding on cross-examination that Article XIII made the powers expressly delegated to congress mandatory); *Oneida Indian Nation of New York*, 691 F.2d at 1091.

D. *Indian Power under the Articles of Confederation*

Congress' Indian powers are found in Article IX of the Articles of Confederation. Clause 4 which deals specifically with Indian affairs, provides:

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[7] The signatory clause also provides, "(T)he articles thereof shall be inviolably observed by the States we re(s)pectively represent, and that the Union shall be perpetual." Art. of Confed. art. XIII.

[8] For example, congress' war and peace and treaty-making powers made foreign treaties binding upon the states. The fact that some of the states violated the Treaty of Paris and congress was powerless to enforce the treaty, did not legitimize the states' actions.

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

Clause 1 gives "The United States in Congress assembled . . . the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article. . . ." The exception in Article VI cl. 5 provides that "(n)o State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted. . . ."

Contemporary historical records reveal that the extent of congress' Indian powers was a source of considerable confusion and was hotly debated throughout the confederal period. The historical events surrounding the Articles of Confederations's enactment and Indian policy at that time provide insight into the framers' intent. Plaintiffs contend that Indian relations were considered external in nature and were given to congress as part of its external sovereign powers. Defendants argue that Indian affairs were perceived as internal; therefore, Indian relations within the states' borders were left to the individual states. Neither party is correct. The Indian tribes were not treated solely as foreign nations or as citizens of the states. What is most striking about Indian relations during this period is that they were unique. The

Supreme Court's conflicting descriptions of the Indian tribes in its early decisions emphasize their unique status. *See eg. Worcester,* 6 Pet. at 559, 31 U.S. at 559; *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 15-17, 8 L.Ed. 25 (1831). *See also* Horseman, Tr. 987.

The Indian tribes, like those comprising the Six Nations Iroquois Confederacy, were independent, sovereign entities. They governed themselves and were generally not subject to state or national law. Their lands crossed state boundaries, and they were capable of waging war on the white settlements at great expense to the fledgling nation. However, the Indians did not own fee title to their land. They had only the right of occupancy which the sovereign could extinguish. Moreover, congress did not ratify Indian treaties like foreign treaties. Report of Senator Carroll to the Senate on Ratification of the Fort Harmar Treaty of 1789 (Sept. 18, 1789), *reprinted in* 1 *American State Papers, Indian Affairs,* 59 (Richardson ed. 1932), Ex. B X 12. Faulkner, Ex. C, p. 5; Rakove, Ex. E2, pp. 84, 104-05; Tr. 786-88. Perhaps the best description of the Indian tribes' unique status is found in *Cherokee Nation.* The Supreme Court described the Indians as "domestic dependent nations". *Cherokee Nation,* 5 Pet. at 17, 30 U.S. at 17. Indian relations therefore did not fall neatly within either congress' external powers or the states' internal sovereignty. As a result, both the central government and the individual states treated with the Indians both before and after the Articles of Confederation.

Indian policy was based on two overriding concerns, war and land. Horsman, Tr. 991. As noted above, the

Indian tribes were powerful, independent "nations". Neither the new government nor the individual states had the economic resources and manpower to engage in a major Indian war. During the pre-confederal period congress' primary concern was keeping the Indians from joining the British in the Revolutionary War. Afterwards, congress feared that incursions on Indian land and fraudulent dealings with the Indians would induce the tribes to unite against the nation in an Indian war. Congress also feared that the Indians would again ally with the British who refused to vacate their forts at Niagara and Oswego after the Treaty of Paris was signed. Moreover, continued Indian hostilities would hinder settlement of the national domain. The states were even less able to absorb the cost of Indian wars.

The states were also engaged in a major controversy over the Western lands. The "landed states", including Massachusetts, Virginia, North Carolina, Georgia, and Connecticut, each claimed title under their charters to the lands "westward to the South Seas". New York was also a "landed state". It claimed western lands under Great Britain's treaties with the Six Nations Iroquois Confederacy. In these treaties the Six Nations placed themselves "under the Crown's protection." The "landless states" New Hampshire, Maryland, Rhode Island, New Jersey, Pennsylvania, Delaware, and South Carolina had fixed borders under their charters. They wanted to limit the landed states' size to more realistic dimensions and to establish a national domain in the West.[9] These lands

[9] The proposed national domain included the Ohio and Mississippi River Valleys.

were necessary to finance the nation's war debt and to compensate the soldiers who had fought in the Revolutionary War. The ability to obtain western land from the Indians by cession or purchase was essential to establishing a national domain. Peace on the frontiers was also necessary to settle the western lands.

The western lands' dispute was one of the primary reasons why the Articles of Confederation, which were submitted to congress in 1777, were not ratified until 1781. Horsman, Ex. 1, p. 10. Maryland, a landless state, did not sign until New York ceded its western land claim to congress in February 1781. Virginia and Connecticut offered their land cessions shortly thereafter although congress refused to accept Virginia's cession until 1784. Georgia did not make its cession until after the Constitution was enacted.

Overlapping land claims also created conflict among the landed states. They attempted to consolidate their claims by establishing settlements in disputed areas. *See* Onuf, Ex. 3, pp. 2, 22-23, 25-26. The ability to acquire Indian land was essential. In 1783, Massachusetts revived its charter claim to western New York. The dispute was not settled until the Treaty of Hartford in 1786.

Moreover, land speculating companies and private venturers were buying large tracts of Western land. These purchases threatened both Congress' plans for a national domain and war with the Indians. *See* Letter of George Washington to James Duane (Sept. 7, 1783), *reprinted in* 27 *The Writings of George Washington,* 133-40 (J. Fitzpatrick ed. 1938) Ex. 3 X 94; Letter of Phillip Schuyler to the President of Congress (July 29, 1783), *reprinted in* 3 *Papers*

of the Continental Congress, 601-08, Ex. 3 X 93. These events substantially influenced the Articles of Confederation, national and state Indian policy, and the treaties at issue in the present actions.

E. *Article IX cl. 4*

Article IX cl. 4 of the Articles of Confederation contains congress' primary authority over Indian affairs. It gives the United States in Congress assembled "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of a State within its own limits be not infringed or violated." Although clause 4 can be viewed primarily as an "Indian commerce clause", *see* J. Madison, *The Federalist* # 42 329, 334 (Jan. 22, 1788), Ex. B X 3 (describing clause 4 as regulating commerce with the Indians), "managing all affairs with the Indians" is broad enough to induce making war and peace with them. Congress certainly believed that it had authority under clause 4 to deal with Indian hostilities. *See eg.* Proclamation of 1783, XXV *Journals of the Continental Congress* 602 (Sept. 22, 1783), Ex. E3 X 89 (citing Article IX cl. 4 as authority).

However, the "not members" provision and the legislative right proviso limit congress' "sole and exclusive" clause 4 powers. The final version of clause 4 was a compromise between the landed and landless states in their dispute over the western lands. The congressional delegates intentionally made the limitations on congress' clause 4 powers ambiguous to achieve a consensus. *See Worcester*, 6 Pet. at 558-59, 31 U.S. at 558-59 (provisions

were ambiguous); J. Madison, *the Federalist* # 42 at 334, Ex. B X 3 (language "obscure and contradictory"). The reservation of the states' rights also reflects the delegates' concern for protecting the states' authority against too much centralization.

The legislative history provides insight into the framers' intent. Benjamin Franklin's 1775 draft of the Articles of Confederation gave congress complete control over Indian affairs. No colony could engage in an offensive Indian war without congressional consent. Congress was to form an alliance with the Six Nations Iroquois Confederacy, and no private person or colony could purchase Indian land. Only the United States in Congress assembled could contract for Indian land and only for the benefit of all the colonies. Benjamin Franklin's Articles of Confederation, II *Journals of the Continental Congress* 195-99 (July 21, 1775), Ex. E2 X 8.

Franklin's 1775 plan was never submitted to congress, but John Dickinson used it in drafting his version of the Articles. The Dickinson Draft provided that no colony could engage in war without congress' consent unless it was "actually invaded by Enemies or shall have received certain advice of a Resolution being formed by some Nation of Indians to invade such Colony or Colonies, and the Danger is so imminent, as not to admit a Delay till the other Colonies can be consulted." Dickinson's Draft of the Articles of Confederation art. XIII, V *Journals of the Continental Congress* 546-54 (July 12, 1776), Ex. C X 6A. Congress was to form a "perpetual Alliance, offensive and defensive" with the Six Nations and "other neighboring Nations of Indians." It would also set the states' boundaries. Until the geographical limits of the

states were ascertained, no private person or colony could purchase Indian land. After congress determined the colonies' limits, only congress would be able to purchase Indian land outside of the colonies' limits, only congress would be able to purchase Indian land outside of the colonies' boundaries. Dickinson's Draft of the Articles of Confederation, art. XIV, XVIII, Ex. C X 6A. Article XVIII also gave the United States in Congress assembled "sole and exclusive Right and Power of determining on Peace and War, except in the Cases mentioned in the Thirteenth Article (emergency Indian attacks)" and "exclusive Right and Power of . . . managing all Affairs with the Indians." By giving congress the exclusive right to purchase Indian land outside the states after the states' limits were determined, the Dickinson Draft implies that the states could purchase Indian land within their limits once those limits were fixed.

Dickinson's Draft was submitted in July, 1776. The Committee of the Whole eliminated the language which authorized congress to set the states' borders and to purchase land outside of the states. Congress' "exclusive Right and Power of. . . . Regulating the Trade, and managing all Affairs with the Indians" was rephrased and limited to Indians "not members of any of the States."

On October 27, 1777, two amendments were proposed. The first would have eliminated "not members of any of the States" and substituted, "not residing within the limits of any of the Unite States." This proposal would have placed a geographical limit on congress' power. Congress would only be able to manage all Indian affairs, including war and peace, outside of the states' borders.

The second proposal would have eliminated the entire paragraph and given congress the right of "managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits wherein a particular State claims, and actually exercises jurisdiction." IX *Journals of the Continental Congress* 841, 844 (Oct. 27, 1777), Ex. C X7. Assuming that "not members" means nonassimilated Indians,[10] congress would have war and peace powers over Indians both inside and outside of the states. However, it would only have authority over trade with the Indians located outside of the states' boundaries. The states would retain all power, except war and peace powers, over the Indians residing within their borders.

Congress rejected both these amendments. Instead, it accepted a compromise which retained the previous language and added the legislative proviso. Congress was given the power to "regulate trade and manage all affairs with the Indians, not members of any of the State, provided that the legislative right of any State within its own limits be not infringed or violated." IX *Journals of the Continental Congress* 844, 845 (Oct. 28, 1777), Ex. C X7.

The various drafts of the Articles reveal several things. First, the drafts went from greater centralized control over Indian affairs to less centralized control. Second, congress knew how to express geographical restrictions when it wanted. Third, even the Dickinson

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[10] See discussion *infra* pp. 431-32.

Draft, which proposed the greatest centralization of the drafts that were actually submitted to congress, allowed the states to purchase Indian land within their boundaries once those boundaries were set.

This legislative history as well as contemporary historical interpretation and congress' actual practice indicate that the "not members" language in clause 4 was not intended as a geographical restriction on congress' Indian authority. *The Oxford English Dictionary* defines a "member" as a "constituent part of anything" or "(e)ach of the individuals belonging to or forming a society or assembly." VI *The Oxford English Dictionary* 326 (1970). In contrast, a person is "resident" in a place if that person is "residing", "dwelling or having an abode in a 'place'." *Id.* at 518.[11] This is how James Madison understood the " 'not members' " provision.[12] In his November 27, 1784, letter to James Monroe, he states, "By Indian(s) not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws." Letter Of James Madison to James Monroe (Nov. 27, 1784), *reprinted in* 8 *Papers of Madison* 156 (R. Rutland, *et al.* eds.), Ex. E3 X 140.

The legislative history discussed above supports Madison's interpretation. Congress rejected the two

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[11] To "reside" means "(t)o dwell permanently or for a considerable time, to have one's settled or usual abode, to live, *in* or *at* a particular place." VI *Oxford English Dictionary* 517 (1970).

[12] *The Oxford English Dictionary* indicates that these usages were prevalent during pre-confederal and confederal periods.

amendments which would have expressly limited congress' authority over Indian affairs by geographical location. In the second proposed amendment the "not members" restriction attached to congress' war and peace powers was also clearly intended to give congress greater authority over was and peace than trade, which was restricted to Indians not "resident" within the states' limits or jurisdiction.

Moreover, congress' actions support Madison's understanding of the "not members" restriction. Congress did in fact deal with Indians who dwelt within the states' limits. The Ordinances of 1775 and 1786 established the Indian departments which had jurisdiction over Indian territory within the states, and the various peace treaties, including the treaties of Fort Stanwix and Hopewell, involved Indian tribes located within the states' recognized borders.

Additional evidence that the "not members" provision referred to nonassimilated Indians is found in James Duane's advice to New York Governor Clinton and in the Treaty of Galphinton. Both Duane and the State of Georgia attempted to use the "not members" restriction to circumvent congress' Indian authority. Duane advised Governor Clinton that the Six Nations "should be treated as *ancient dependents of this (New York) state*, placed under its protections, with all their territorial rights, by their own consent publicly manifested in solemn and repeated treaties. . . . On this ground the tribes in question may fall under the character of *Members of the state* with the management of which Congress have no concern." (emphasis in the original). Letter of James Duane to Governor George Clinton (n.d.), *reprinted in 1 Proceedings of the*

Commissioners of Indian Affairs 21 n. 1 (B. Hough 1861), Ex. C X24. The Treaty of Galphinton between Georgia and the Creeks declared that the Indians within Georgia's limits "have been, and now are, members of the same, since the day and date of the constitution of the state." Treaty of Galphinton (Nov. 12, 1785), *reprinted in 1 American State Papers, Indian Affairs* 17, Ex. B X 21. Moreover, the legislative proviso would be superfluous if the "not members" language restricted congress to dealing with Indians outside of the states. The court finds that the "not members" provision was intended to restrict congress' Article IX cl. 4 authority of "managing all affairs with the Indians" to nonassimilated Indians.

In the present actions the Six Nations, including the Oneidas, were independent tribes. They were not assimilated into the society of New York or any other state. *See* Horsman, Tr. 1038-39. Accordingly, the Oneidas were "not members of any of the States" within the meaning of Article IX cl. 4.

The legislative right proviso is less clear. Again, James Madison offers the most consistent interpretation of congress' intent:

> In the case of Indians of this description the only restraint on Congress is imposed by the *Legislative authority* of the State. If this proviso be taken in its full latitude, it must destroy the authority of Congress altogether, since no act of Congs. within the limits of a State can be conceived which will not in some way or other encroach upon the authority [of the] States. In order then to give some meaning to both parts of the sentence, as a known rule of interpretation requires, we must restrain this proviso to some particular view of the parties. What was this view? My answer is that it was to save to the State

> their right of preemption of lands from the Indians. My reasons are. 1. That this was the principal right formerly exerted by the Colonies with regard to the Indians. 2. that it was a right asserted by the laws as well as the proceedings of all of them, and therefore being most familiar, wd. be most likely to be in contemplation of the Parties. 3. that being of most consequence to the States individually, and least inconsistent with the general powers of Congress, it was most likely to be made a ground of Compromise. 4. it has been always said that the proviso came from the Virga. Delegates, who wd naturally be most vigilant over the territorial rights of their Constituents. (emphasis in the original)

Letter of James Madison to James Monroe (Nov. 27, 1784), *reprinted in* 8 *Papers of James Madison* at 156-57, Ex. 3 X 140.

The states, particularly the landed states, considered their right to preempt Indian land within their individual borders their most important Indian power. The legislative right proviso was proposed by the Virginia delegation. Virginia, a landed state, had strong states' rights sentiments. Madison describes the Virginia delegates as "most vigilant over the territorial rights of their Constituents." *Id.* Like New York and North Carolina, Virginia had recently enacted a state constitutional provision prohibiting purchases of Indian land without the state's consent.[13] The proviso thus referred to the states'

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[13] New York's constitution provides:

> Be it ordained, that no purchases or contracts for the sale of lands, made since (October 14, 1775), or which may

(Continued on following page)

constitutional provisions restricting Indian land contracts. *Id.;* Rakove Ex. E2, pp. 37-38; Tr. 723-24; Ketchum, Ex. D2, pp. 6-8. *See* Lerner, Ex. A, pp. 30, 32.

By the time the Articles were passed, the national domain was imminent. The compromise would allow the states to consolidate their land claims within their recognized limits while leaving the central government free to purchase land in the national domain. Moreover, the compromise would still permit the central government to manage Indian affairs within the states when its actions did not interfere with the states' legislative right. Allowing the states to control Indian land purchases within their borders would also prevent uncontrolled purchases by private land speculators. The legislative proviso was thus less threatening to the landless states' plans for establishing a national domain and the need to prevent Indian hostilities. *See* Letter of George Washington to James Duane (Sept. 7, 1783), *reprinted in* 27 *Writings of George Washington* 133, Ex. E3 X 94.

Georgia and North Carolina did not share Madison's interpretation of the legislative right proviso. Their actions indicate that they believed that congress had not authority to deal with Indians within their respective states. *See* Report of a Committee of the Georgia General Assembly (Feb. 11, 1786), al *American State Papers, Indian Affairs* 17, Ex. B x 25 (Treaty of Galphinton protested as

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(Continued from previous page)

> hereafter be made with or of any of the said Indians, within the limits of this State, shall be binding on the said Indians, or deemed valid, unless made under the authority and with the consent of the legislature of this State.

N.Y. Const. art. XXXVII (April 20, 1777), *reprinted in* 5 *Federal and State Constitutions* 2623, 2636 (F.S. Thorpe ed.), Ex. D2 X 7.

ultra vires); Senate Committee, Claims on the Lands (March 1, 1797), *reprinted in* 1 *American State Papers, Indian Affairs* 78, Ex. B X 24 (Hopewell treaties protested as ultra vires); Letter of Benjamin Hawkins to Thomas Jefferson (June 14, 1786), *reprinted in* 9 *Papers of Thomas Jefferson*, 640, 641 (Boyd ed.), Ex. E3 X 154.

Georgia and North Carolina's views were not shared by the other states. Even New York did not contest the Fort Stanwix Treaty once the treaty had been completed. Moreover, Georgia and North Carolina's interpretation would essentially "annul" the Indian power given to congress, *see Worcester*, 6 Pet. at 557-58, 31 U.S. at 557-58, or at least it would restrict the central government's authority to Indian affairs outside of the states. The framers of the Articles of Confederation expressly rejected this interpretation when they rejected the October 27, 1777 amendments.

Plaintiffs argue that the legislative right proviso reserved the states' right of preemption but only after congress had extinguished Indian title. As discussed hereafter, very little support for plaintiffs' position can be found among the contemporaries of the period or in congress' actions. It is also unlikely that the states which objected so vehemently to the Royal Proclamation of 1763 would agree to retain the right of preemption without the right of extinguishment. Moreover, Madison's interpretation gives effect to all of clause 4's provisions. The court therefore finds that the legislative right proviso in Article IX cl. 4 retained to the states their legislative right to purchase Indian land within the states' limits.

The Six Nations (plaintiff/intervenors) contend that the Oneidas' land was not located within New York's recognized limits because Massachusett's claim to western New York was not settle until 1786. According to the Six Nations, Article IX cl. 4's legislative right proviso and the "not members" restriction, even if they are interpreted geographically, do not apply to the Oneidas. However, the weight of authority is against the plaintiff/intervenors. Once congress accepted New York's western land cession in 1782, New York's border was, for all practical purposes, fixed. The Oneidas were located well east of New York's western border. *See eg.* Letter of James Monroe to James Madison (Nov. 15, 1784), *reprinted in* 1 *Writings of Monroe* 46, 47 (Hamilton ed.), Ex. C X 39; Rakove, Ex. E2, pp. 50-54, 96-97; Faulkner, Tr. 451; Onuf, Tr. 1317, 1320-22, 1338-39, 1366; Treaty of Hartford (Dec. 11, 1786), Ex. H. *See also* Ex. I; Ex. J (historical maps).

F. *Article IX cl. 1*

The other potential source of congress' authority over the Indians is Article IX cl. 1. Clause 1 gives the United States in Congress assembled "sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article." The parties' experts agree that congress had war and peace powers over Indians. However, defendants contend that congress' Indian war and peace powers are part of congress' authority to "mangage all affairs with the Indians" under Article IX cl. 4. In support of their position, defendants argue that congress often cited clause 4 language when dealing with the Indians. They also emphasize that clause

4, which deals specifically with congress' Indian authority, is located in the Articles with congress' other internal powers. Congress' war and peace powers, however, are included in clause 1 which deals with foreign affairs.

Although defendants' argument is somewhat appealing, the plain language of clause 1 indicates that congress had clause 1 authority over Indians. The grant in clause 1 is broad; it does not restrict congress' authority to war and peace with foreign nations. The only limitations on congress' clause 1 powers are in Article VI. Article VI prohibits the states from waging war without congress' consent "unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted." Art. of Confed. art. VI cl. 5. The fact that Article IX cl. 1 expressly incorporates Articles VI's reference to wars with Indians shows that the congressional delegates had Indian war and peace in mind when they granted congress its clause 1 powers. *See* Horseman, Tr. 985-86.

Although congress often cited clause 4 as its authority when dealing with the Indians, the treaties which established peace with the Indians after the Revolutionary War do not cite Article IX cl. 4 as their authority. Moreover, clause 1 grants congress the right of "determining" on war and peace. *See Worcester*, 6 Pet. at 557, 31 U.S. at 557. Such documents as the Proclamation of 1783 and the Ordinance of 1786 which contain clause 4 language do not actually "determine" on war and peace

even though they might have indirectly implicated war and peace matters.

Article IX cl. 1 also gives congress "sole and exclusive right and power of . . . entering into treaties and alliances. . . ." There is no question that congress had the authority to enter into treaties with the Indians. *See Id.* at 559; *Oneida Indian Nation of New York*, 691 F.2d at 1089-90. However, congress' treaty-making power in clause 1 was not intended to prohibit the states from forming Indian treaties. Article IX delegates various powers to congress. Article VI complements Article IX by prohibiting the states from exercising congress' Article IX powers. Unlike Articles IX cl. 1 and VI cl. 5's delegation of war and peace powers, neither Article IX cl. 1 nor Article VI's treaty-making provisions contains any reference to Indian treaties. Article VI merely prohibits the states from entering into treaties with foreign nations or other states. The provision which follows and limits congress' sole and exclusive treaty-making power under Article IX cl. 1 deals with commerce treaties. Indian commerce, however, is governed by Article IX cl. 4. The structure and content of Article IX cl. 1 and IV indicate that the framers were not contemplating Indian treaties in clause 1. Because congress treated Indian treaties differently from foreign treaties, the omission is not unusual. Moreover, if clause 1 prohibited all Indian treaties except those made by congress, the powers reserved to the states in Article IX cl. 4 would be a nullity. In actual practice, both congress and the states formed treaties with the Indians during the confederal period. Accordingly, it follows that Article IX clause 1 did not prohibit the states from entering into treaties with the Indians, except war and peace treaties.

G. *Views of Contemporary, Historical Statesmen*

The fact that Article IX cl. 1 gave the central government exclusive power of "determining on peace and war" does not mean that the states also gave congress the right to extinguish Indian title within the states' borders or to prohibit the states from purchasing instate Indian land, at least where the states' purchase did not directly interfere with congress' determination on peace and war.[14] After struggling to protect their legislative right in clause 4, the landed states would hardly be willing to cede that right in Article IX cl. 1. As noted above, the delegation of Indian powers caused considerable debate during the confederacy. The views of the leading statesmen indicate that the states retained their power to purchase instate Indian land under the Articles of Confederation.

George Washington had a major influence in shaping Indian policy during the confederal and post-confederal periods. His views on state and congressional Indian authority during the confederacy are expressed in two documents. The first was written in 1783, before the Proclamation of 1783 and the Fort Stanwix Treaty. The second was written in 1790, after the Constitution was enacted.

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[14] One of the issues that the Second Circuit remanded is whether the limiting language in Article IX cl. 4 restricted congress' Article IX cl. 1 powers. The court finds no evidence that the "not members" language and the legislative right proviso in clause 4 was incorporated either expressly or impliedly into clause 1. However, as hereafter discussed, the court finds that the states did not intend to give congress the right to prohibit them from purchasing Indian land within their limits when the states gave congress its clause 1 power.

Washington's September 7, 1783, letter to James Duane, Chairman of the congressional advisory committee to the Commander in Chief, influenced both the Proclamation of 1783 and the Treaty of Fort Stanwix. It advised congress on Indian policy and recommended that congress establish peace with the Indian. At that time, the United States was still technically at war with the Indians because the Treaty of Paris did not include the Indian tribes. Like the other statesmen of the period, Washington did not question whether the settlers should eventually take over the Indians' lands. He was concerned about how the settlement would be achieved. Washington considered speculators' attempts to purchase large tracts of Indian land and the plans of some states, including New York, to expel the tribes form their borders a threat to establishing both peace and a national domain. In his letter to Duane, Washington advocates orderly settlement of the land. He writes, "No purchase (of Indian land) under any pretense whatever should be made by any other authority than that of the sovereign power, *or the Legislature of the State in which such lands may happen to be.*" (emphasis added) Letter of George Washington to James Duane (September 7, 1783), *reprinted in 27 Writings of George Washington* at 137, Ex. E3 X 94.

Washington's reply to Seneca Chief Cornplanter in 1790 was written while he was President under the Constitution. The Senecas had complained about the Treaty of Fort Stanwix and asked the new government to give back some of their ceded land. Cornplanter also complained about certain land purchases. In his reply Washington explains the difference in the states' powers under the Constitution and the Articles of Confederation.

> I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.

Reply of the President of the United States to the Speech of the Cornplanter, *et al.*, (Dec. 29, 1790), *reprinted in* 4 *American State Papers, Indian Affairs* 142, Ex. D2 X 12.

Washington then analyzes the validity of two land purchases made after the Treaty of Fort Stanwix.

> Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwyx, the 22d of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of you. You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. It appears, upon inquiry of the Governor of New York, that John Livingston was not legally authorized to treat with you, and that every thing that he did with you have been declared null and void, so that you may rest easy on that account. But it does not appear, from any proofs yet in possession of Government, that Oliver Phelps has defrauded you.

Id. Washington tells Cornplanter that the federal government is bound by the Treaty of Fort Stanwix to protect the

Indians' land except for the land that they have "fairly sold" to persons authorized to purchase from them. Washington then looks to the state to determine whether the purchases in question were valid. Because New York had not "legally-authorized" Livingston's purchase, it was void.

Washington's writings reveal that Washington believed, both during the confederacy and afterwards, that under the Articles of Confederation the states could purchase Indian land within their borders. *See* Ketchum, Ex. D2, pp. 11-14; Tr. 0536-41; Faulkner, Ex. C, pp. 45, 58-59. The fact that congress could not control these purchases was one of the "evils" that the Constitution "entirely altered."

James Monroe and James Madison's correspondence concerning the Fort Stanwix peace negotiations concurs with Washington's views. Before the national negotiations, New York attempted to obtain a cession or purchase of land from the Six Nations. When the negotiations failed, Governor Clinton instructed New York observers at the Fort Stanwix Treaty to disrupt the national treaty if the treaty would infringe on New York's legislative rights. Monroe asked Madison's opinion on New York's actions. In his letter of November 15, 1784, Monroe concludes:

> In either event the land held by these *Indians*, having never been ceded either by *N. York* or *Massachusetts* belongs not the *U. States*; the only point then in wh. *N. York* can be reprehensible is, for preceding by a particular [state treaty], the general *Treaty*. This must be attributed to a suspicion that there exists in *Congress* a design to injure her. (emphasis in the original)

Letter of James Monroe to James Madison (Nov. 15, 1784), *reprinted in* 1 *Writings of Monroe* at 47, Ex. C X 39.

Madison replies:

> The Idea which I at present have of the affair leads me to say that as far as N.Y. may claim a right of treating with Indians for the purchase of lands within her limits, she has the confederation on her side; as far as she may have exerted that right in contravention of the Genl. Treaty, or even unconfidentially with the Comisrs. of Congs. she has violated both duty & decorum.

Letter of James Madison to James Monroe (Nov. 27, 1784), *reprinted in* 8 *Papers of James Madison* at 156, Ex. E3 X 140.

Neither Monroe nor Madison disputes New York's right to purchase Indian land within its limits. Their only uncertainty is whether New York could assert her right at the same time that congress was trying to ~~nego~~tiate a peace treaty. If New York succeeded in obtaining Indian land by purchase or cession, congress would probably not be able to obtain a peace treaty containing a land cession. *See,* Arthur Lee to the Chairman of the Committee of the States (Aug. 4, 1784) 4 *Papers of the Continental Congress* 129, 129-30, Ex. E3 X 126; Report of the Pennsylvania Delegates to the Pennsylvania Assembly (Sept. 25, 1783), 7 *Letters of the Members of the Continental Congress* 308 (E.C. Burnett ed.), Ex. 1 X 31. Madison is unsure of the parties' authority under these circumstances although his use of "duty and decorum" suggests that New York should have consulted congress out of deference rather than legal obligation. *See* Ketchum, Ex. D2, pp. 17-21, Tr. 0542-49; Sigliano, Ex. B, pp. 36-38, 40-41, 44-45; Faulkner, Ex. C, pp. 50-52; Rakove, Ex. E2, pp. 95-98.

Jefferson's interpretation is less clear. He expresses three apparently contradictory opinions over a sixteen month period. Jefferson was both a state and a congressional official.[15] Like Washington, Jefferson was against land speculation in the west. He advocated creating a public domain through state cessions and acquiring land from the Indians in an orderly manner. The problems with Indian relations during the confederacy made Jefferson a strong advocate of centralizing control over all Indian affairs under the Constitution. Ketchum, Ex. D2, pp. 15-16.

In his May 3, 1790, letter discussing Georgia's grant of instate Indian land to a private land company, Jefferson states:

> If the country, instead of being altogether vacant, is thinly occupied by another nation, the right of the native forms an exception to that of the new comers; that is to say, these will only have a right against all other nations except the natives. Consequently, they have the exclusive privilege of acquiring the native right by purchase or other just means. This is called the right of preemption, and is become a principle of the law of nations, fundamental with respect to America. There are but two means of acquiring the native title. First, war; for even war may, sometimes, give a just title. Second, contracts or treaty.
>
> The States of America before their present union (under the Constitution) possessed completely, each within its own limits, the exclusive right to use these two means of acquiring the native title, and, by their

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[15] Both Jefferson and Madison were members of the Virginia government. Jefferson was governor and Madison was a member of his council. Jefferson later became Secretary of State under the Constitution.

> act of union, they have as completely ceded both to the general government. (citations to the U.S. Const. omitted)

T. Jefferson, Opinion upon the Validity of a Grant by the State of Georgia to Certain Companies of Individuals (May 3, 1790), *reprinted in* 3 *Writings of Thomas Jefferson*, 18, 19-20 (Bergh ed. 1907), Ex. B X 33. Jefferson's conclusions are not entirely accurate. Under the Articles of Confederation the states could not obtain Indian land by war because Article VI prohibited the states from engaging in offensive Indian wars without congress' consent. However, Jefferson expressly recognizes the states' right to contract or treat for Indian land within their limits.

> Just two months later Jefferson wrote: The Cherokees were entitled to the sole occupation of the lands within the limits guaranteed to them. The State of North Carolina, according to the *jus gentium* established for America by universal usage, had only a right of pre-emption of these lands against all other nations. It could convey, then, to its citizens only this right of pre-emption, and the right of occupation could not be united to it till obtained by the United States from the Cherokees.

Thomas Jefferson to Secretary of War Knox (Aug. 26, 1790), *reprinted in* 8 *Writings of Thomas Jefferson* 99, 100, Ex. C X 51. In 1791 Jefferson also wrote:

> I am of the opinion . . . that the Indians have a right to the occupation of their lands, independent of the States within whose chartered lines they happen to be; that until they cede them by treaty or other transaction equivalent to a treaty, no act of a State can give a right to such lands; that neither under the present constitution, nor the ancient confederation, had any State or person a right to treat with the

> Indians without the consent of the General Government. . . .

Thomas Jefferson to Secretary of War Knox (Aug. 10, 1791), *reprinted in* 8 *Writings of Thomas Jefferson* 226, 226-27, Ex. C X 52.

Defendants' experts contend that Jefferson's latter opinions refer to grants of land which North Carolina and Georgia had never purchased from the Indians and which were located outside the states' recognized boundaries. In particular, Jefferson's 1791 opinion concerns Georgia's 1789 grant of land located in the intended national domain to the notorious Yazoo Company. *See* Faulkner, Ex. C, pp. 75-77; Ketchum, Ex. D2, pp. 16-17; Sigliano, Ex. B, p. 46. If defendants' experts are correct, Jefferson's latter opinions would be consistent with his May 3, 1790, opinion. Otherwise, no firm conclusions can be drawn from Jefferson's conflicting views. The court, however, notes that he expressed the above opinions after the Constitution was enacted, at a time when North Carolina and Georgia were creating considerable problems with the Indians by taking cessions of their land.

Secretary of War Henry Knox, who had authority over Indian affairs during this period, was a strong advocate of centralized control. Even his writings, however, suggest that the states retained the right to purchase Indian land within their borders. Knox's report to congress on July 17, 1788, concerns the problems between North Carolina and the Cherokees. Knox recommends that congress issue a proclamation upholding the Hopewell Treaties and deploying troops, if necessary, to enforce the treaties. Knox apparently relies on congress' authority under its war powers when he states that "the

said enormities have arisen at length to such an height as to amount to an actual although informal war of the said white inhabitants against the said Cherokees." H. Knox, Report of the Secretary of War on the letter of Col. J. Martin (July 17, 1788), XXXIV *Journals of the Continental Congress* 342 (July 18, 1788), Ex. 1, X 39. Knox reports that North Carolina would probably not object "to any equitable interference of Congress to fulfill the said treaty (Hopewell), so far as to oblige all persons to remove from the limits assigned by the treaty who have not fairly purchased the lands of the Indians." He then recommends that the proclamation provide "(t)hat all persons who have settled on any of the said lands unless the same shall have been fairly purchased of the said indians shall be warned at their peril to depart. . . ." *id.* at 343. Knox thus recognizes that land could be "fairly purchased" from the Indians.

In July 1789 under the new Constitution, Knox again urges congress to pass "a declarative law" that the Indian tribes possess "the right of soil of all lands within their limits" and that they cannot be divested of their right except by "fair and bona fide purchase, under the authority of the United States". Knox explains:

> The independent nations and tribes of Indians ought to be considered as foreign nations, not as subjects of any particular State. Each individual State, indeed, will retain the right of pre-emption of all lands within its limits, which will not be abridged: but the general sovereignty must possess the right of making all treaties, on the execution or violation of which depend on peace or war.

Secretary of War Knox to the President of the United States (July 7, 1789), *reprinted in* 1 *American State Papers,*

Indian Affairs 52, 53, Ex. 1 X 42. Knox's repeated requests for congress to issue a proclamation or law giving the central government greater control over Indian affairs, particularly land transactions, suggests that congress' power in this area during the confederacy was not absolute. *See* Faulkner, Ex. C, pp. 24-25.

H. *Congress' Application of the Articles of Confederation*

Congress' actions during the confederal period also indicate that the states retained the right to purchase Indian land within their borders. Two incidents occurred concerning the Fort Stanwix peace negotiations which involved a conflict between the central government's peacemaking powers and the states' right to purchase Indian land. The first involved Pennsylvania's proposal to purchase virtually all of the Indian land within its borders. Perceiving a potential conflict with the national treaty negotiations, Pennsylvania informed congress of its intent and requested a response. However, the Pennsylvania legislature believed that it had the right to extinguish Indian title within its limits. The committee which recommended consulting congress stated:

> (A)lthough the Articles of the Confederation do not by any means explicitly restrict this house from entering on this business independent of Congress, yet being deeply impressed with the delicacy of touching any subject of federal relation, but with the most deliberate caution; and as the letter of a clause in the ninth section appears to involve a doubt, they think proper to submit the following resolution. . . .

Resolution of the General Assembly of Pennsylvania (Sept. 12, 1783), *reprinted in* XXV *Journals of the Continental*

Congress 594 (Sept. 20, 1784), Ex. E 3 X 113. Pennsylvania's instructions to its congressional delegates also asserted the state's legislative right:

> Although this business may be said strictly to regard only the internal policy of Pennsylvania, and the conference proposed does not extend to any description of men without the limits of the United States, nor regard any of the great objects of peace or war; yet our high respect for the Confederation determines us to lay open the whole design of the State to Congress.

Id. at 595.

Pennsylvania's proposed treaty presented a serious problem for the central government. Congress hoped to negotiate a large land cession from the Indians at the Fort Stanwix Treaty. If the Indians could obtain money for their land from the states, they would probably not cede their land to the United States. Despite Pennsylvania's assertion that her treaty for land was strictly an internal matter, her actions could have directly jeopardized congress' ability to make peace with the Six Nations.

Congress debated extensively its response to Pennsylvania. Even though Pennsylvania's proposal might have directly interfered with congress' Article IX cl. 1 right to "determine on peace", congress did not forbid Pennsylvania's actions. The delegates rejected various amendments which ordered the state to wait until after congress had completed the national treaty. Congress also rejected amendments which ordered the state to avoid all war and peace matters as the central government's exclusive province. Instead of asserting its authority over the state, congress finally invited Pennsylvania to attend the

national treaty for the "sole purpose" of purchasing lands within the state's limits. Congress also instructed the congressional commissioners "to give every assistance in their power . . . towards promoting the interest of that State, as far as the same may consist with the general interest of the Union." XXV *Journals of the Continental Congress* 762-67 (Oct. 30, 1783), Ex. E3 X 116.

The second incident involving a jurisdictional conflict between a state and congress was New York's attempt to treat for land with the Six Nations before the national treaty. Unlike Pennsylvania, New York did not consult congress about its plans. Massachusetts had revived its claim to western New York. It had also managed to exclude New York representation from the Indian Commission. New York feared that the national treaty might jeopardize the state's interests. Rakove, Ex. E2, pp. 76-77, 82-83. It therefore attempted to negotiate a peace treaty with the Six Nations and to obtain cessions of their land before congress could organize the national treaty. New York planned to consolidate its claim by settling the disputed area. Onuf, Ex. 3, pp. 2, 22-23, 25-26.

Although New York's actions created considerable concern, congress did not forbid them. Instead, Arthur Lee and Richard Butler, Commissioners for Indian Affairs, invited New York to treat with the Indians at the national treaty out of "respect for the Confederation":

> As the particular Nature of the Business your Excellency is to transact with the Six Nations on the Part of this State, is not known to Us, We can not form a proper Judgment how far it is compatible with the Commission we have the honor to bear from the United States in Congress assembled. But We submit to your Excellency's Determination, whether that

> Business will not be more properly transacted at the same time with and in Subordination to the General Treaty. Such conduct on the Part of the State of Pennsylvania has been generally approved for its Wisdom and Confederal Policy. It is with a View that this State may have an opportunity of showing the same Respect for the Confederation and may avail itself of the same Advantages that We have the honor of communicating to your Excellency our Determination to meet the Indians of the Six Nations at Fort Stanwix on the 20th of September next.

Letter of Arthur Lee and Richard Butler to New York Governor George Clinton (Aug. 19, 1784), *reprinted in* 1 *Proceedings of the Commissioners of Indian Affairs* 29, 30 (B. Hough ed. 1861), Ex. B X 30.

Both the Pennsylvania and New York's proposed land transactions could have directly interfered with congress' Article IX cl. 1 power to make peace with the Six Nations. In fact, New York actually attempted to negotiate a "peace" treaty. However, the central government never questioned the states' ultimate right to purchase Indian land within their borders; it only questioned the states' timing. Moreover, congress' debates and responses suggest that congress did not believe that its authority was superior to the states' authority in this area. At most, congress was unsure of its power.

The Ordinance of 1786 also reveals the central government's deference to the states' legislative right. It established the Northern and Southern Indian districts and prohibited private persons from settling on Indian land or trading with the Indians located in the United States' territory. Congress amended the Ordinance to require the district superintendents to act "in conjunction

with the Authority of (the) state" in all cases "where transactions with any nation or tribe of Indians, shall become necessary . . . which cannot be done without interfering with the legislative rights of a state." Ordinance of 1786, XXXI *Journals of the Continental Congress* 490, 493 (Aug. 7, 1786), Ex. C X 47.

The central government's reactions to the Southern states' Indian problems is also revealing. Georgia and North Carolina did not cede their western land claims to the United States until 1802 and 1790, respectively. As noted above, both states interpreted the Articles of Confederation to preclude the central government from transacting any business with the Indians located within their states limits. *See* Letter of Benjamin Hawkins to Thomas Jefferson (June 14, 1786), *reprinted in* 9 *Papers of Thomas Jefferson* 640, 641 (J. Boyd ed.), Ex. 3 X 154; Rakove, Ex. E2, pp. 105-08. Consequently, both states renounced the Hopewell Treaties. They took land cessions from the Indians which created widespread hostility. The Southern Department's reports during the period contain some of the strongest language advocating that congress take total control over Indian affairs, including the right to extinguish Indian title within the states. However, congress generally ignored these suggestions. *See* XXXIII *Journals of the Continental Congress* 455, 455-63 (Aug. 3, 1787), Ex. E3 X 157 (defeating motion to consider Southern Committee's Aug. 3, 1787 report).[16] In fact, the central government's inability to deal effectively with Indian problems

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[16] Despite the Southern Committee's interpretation of congress' Indian authority, it recommended that congress persuade the Southern states to make land cessions to the United States rather than provoke a jurisdictional conflict.

in the South lead to congress' plenary control over Indian affairs under the Constitution and the Nonintercourse Act.

There is little doubt that the Southern states were violating the peace treaties and the Articles of Confederation. *See* J. Madison "Vices of the Political System of the United States" (April, 1787), *reprinted in* 9 *Papers of James Madison* 348, Ex. C X 16. As Knox states, Georgia was essentially "engaging in war with the Indians." The situation in New York, however, was different. Georgia and North Carolina were taking cessions of Indian land and creating war with the Indians. New York's 1785 and 1788 treaties were purchases. Congress apparently had no objection to these treaties. Rakove, Tr. 781-82. If Article IX cl. 1 gave the central government power to prohibit the states from purchasing Indian land within their limits, it did so only where such purchases would directly jeopardize congress' "determinating on peace or war". The 1785 and 1788 treaties were conducted well after the peace treaty at Fort Stanwix had been concluded.

I. *Proclamation of 1783*

Congress issued the Proclamation of 1783 on September 22, 1783. It provides:

> Whereas by the ninth of the Articles of Confederation, it is among other things declared, that "the United States in Congress assembled have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any State, within its own limits, be not infringed or violated." And whereas it is essential to the welfare and interest of the United States as well

> as necessary for the maintenance of harmony and friendship with the Indians, not members of any of the states, that all cause of quarrel or complaint between them and the United states, or any of them, should be removed and prevented: Therefore the United States in Congress assembled have thought proper to issue their proclamation, and they do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled.
>
> And it is moreover declared, that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession or settlement.

XXV *Journals of the Continental Congress* 602 (Sept. 22, 1783), Ex. E3 X 89.

The Proclamation cites Article IX cl. 4 as its authority. Although it was designed to maintain "harmony and friendship with the Indians" and to remove "all cause of quarrel or complaint", the Proclamation of 1783 was not a "determination on peace and war" under Article IX cl. 1. The peace treaty would not come until 1784. The legislative history also reveals that congress omitted introductory language from the first draft which implied that congress was invoking its warmaking powers.[17] The final

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[17] The first draft's introductory paragraph which was eliminated provided:

> Whereas it has been represented that sun-dry persons are preparing to settle upon lands within the U.S. which

(Continued on following page)

version substitutes the language from clause 4 in the first paragraph. Congress thus intended to issue the Proclamation under its clause 4 powers. As discussed above, the legislative right proviso expressly retained the states' right to purchase Indian land within the states' limits. Accordingly, congress did not have authority in the Proclamation of 1783 to prohibit New York from purchasing plaintiffs' land located within New York State.

Moreover, congress never intended the Proclamation to prohibit instate land purchases. After the Treaty of Paris established peace with Great Britain, hostilities with the Indians continued. However, the central government took no significant action to establish peace with the Indians until it began receiving reports that settlers were moving onto lands intended for the national domain. Congress issued the Proclamation of 1783 almost immediately thereafter. Rakove, Ex. E 2, pp. 57-59.

The preliminary drafts specifically set a geographical limit on the Proclamation's jurisdiction. All persons were prohibited from "making settlements on land within the United States and without the boundaries of any particular State and from purchasing or receiving any gift or cession of such lands from the Indians." XXIV *Journals of the Continental Congress* 505, 505-06 (Aug. 13, 1783) Ex. E3

(Continued from previous page)

> have not been purchased from the Indian nations by which proceedings the present frontier Inhabitants must be greatly endangered and the U.S. may be involved in War.
>
> Be it ordained by the United States in Congress assembled and it is hereby ordained by the authority of the same. . . .

X 88. *See also* XXIV *Journals of the Continental Congress* 503 (Aug. 12, 1783) Ex. E3 X 87. However, Virginia's land cession was not completed. Congress had only approved the report recommending acceptance on September 13, 1783. As a result, the Proclamation was amended to prohibit purchases and settlements "without the limits or jurisdiction of any particular State" to ensure that congress would have jurisdiction over the western territory until the state cessions were complete. Rakove, Ex. E2, pp. 60-61.

Congress therefore intended the Proclamation of 1783 to apply only to land outside the states' boundaries, in what would be the national domain. *See* Virginia Delegates' Letter to Gov. Benjamin Harrison (Oct. 4, 1783), *reprinted in 7 Papers of James Madison*, 367, Ex. E3 X 90 (stating, "Congress had Issued a Proclamation prohibiting persons from Setling (sic) on Lands within the boundaries of the United States & out of the limits of any of them. . . ."); Rhode Island Delegates to Gov. William Greene (Oct. 9, 1783), 7 *Letters of the Members of the Continental Congress* 326, Ex. 3 X 91 (stating, "A proclamation has issued from Congress prohibiting all persons from purchasing or accepting cessions of land from the Indians without the limits of the particular States. . . . And it is in contemplation to lay off a suitable district from the same for a new State to be disposed of to satisfy the public engagements to the army and to form a fund in aid of public credit."). Because the Proclamation of 1783 only applied to purchases outside the limits of the states, it did not prohibit New York's 1785 and 1788 purchases.

J. *Treaty at Fort Stanwix*

The Treaty of Fort Stanwix was a peace treaty. It ended the War for Independence between the United States and the Six Nations Iroquois Confederacy. *See* Report to Congress of the Commission of Indian Affairs for the Northern and Middle Districts (Oct. 15, 1783), XXV *Journals of the Continental Congress* 680, 681-84, Ex. 1 X 32; Letter of George Washington to James Duane (Sept. 9, 1783), 27 *Writings of George Washington* at 134, 136, Ex. E3 X 94; Horseman, Tr. 988, 1062. The Treaty was thus a valid exercise of both congress' Article IX cl. 4 power to "manage all affairs with the Indians" and its Article IX cl. 1 power of "determining on peace and war".[18] As discussed above, however, neither clause gave congress the power to preclude New York State from purchasing Indian land within its borders.

Even if Article IX cl. 1 could be construed to give congress authority over state land purchases, the congressional delegates never intended the Fort Stanwix Treaty to preclude the states from purchasing Indian land within their recognized limits. The treaty's primary goal was to obtain a cession of western lands for the national domain. It was also intended to secure peace with the Six Nations so that the national domain could be settled. *See* Horsman, Tr. 994. The Treaty of Fort Stanwix was fashioned pursuant to George Washington's recommendations to James Duane in 1783, Philip Schuyler's July 29, 1783 letter

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[18] The parties' experts agree that the Fort Stanwix Treaty was a valid exercise of congress' power. Defendants' experts, however, contend that congress' authority came exclusively from Article IX cl. 4.

to the President of Congress, and the Committee for Indian Affairs for the Northern and Middle Districts' report. *See* Letter of George Washington to James Duane (Sept. 9, 1783) *reprinted in* 27 *Writings of George Washington* 134, Ex. E3 X 94; Letter of Philip Schuyler to the President of Congress (July 27, 1783), *reprinted in* 3 *Papers of the Continental Congress* 601, Ex. C X 45; Report of the Committee for Indian Affairs for the Northern and Middle Districts (Oct. 15, 1783), XXV *Journals of the Continental Congress* 680 (Oct. 15, 1783), Ex. 1 X 32; Rakove, Ex. E2, pp. 62-63. They emphasized that peace was necessary to properly settle the national domain. They also recognized that peace could not be achieved without protecting the Indians' right to possess their land. However, the Indians were not supposed to retain possession indefinitely. Washington and Schuyler advised congress that the Indians would voluntarily leave their land as the white settlements increased and game became scarce. Accordingly, Washington, Schuyler, and the Committee advocated orderly acquisition of Indian land. Purchases by private persons, especially the land speculation companies, had to be prohibited. Washington recommended that only the central government and the states, within their respective limits, should be allowed to purchase the Indian's land. Letter of George Washington to James Duane (Sept. 9, 1783), 27 *Writings of George Washington* at 137, Ex. E3 X 94.

When congress adopted the Commission's report it indicated that the proposed peace treaty would not infringe on the states' legislative rights. Congress resolved: "That the preceding measures of Congress relative to Indian affairs, shall not be construed to affect the

territorial claims of any of the states, or their legislative rights within their respective limits." XXV *Journals of the Continental Congress* at 693 (Oct. 15, 1783), Ex. 1 X 32. Congress also resolved to instruct its negotiating team to "reassure" the Oneida and Tuscaroras of their lands "until they may think it for their own advantage to dispose of the same." *Id.* at 687.

The congressional commissioners at Fort Stanwix also understood that they were supposed to reserve the Oneida and Tuscaroras' land until the Indians chose to sell their lands. Richard Butler, one of the commissioners, wrote in his notes that the commissioners were instructed "to reassure the Oneida & Tuscarora tribes of their favr (sic) & that they may rely on the lands which they claim will be reserved for their use & c (comfort) till they think fit to dispose of ym (them)." Richard Butler's Notes on the Treaty of Fort Stanwix (Oct. 18, 1784), *Richard Butler Papers*, 3 U *Lyman Draper Manuscripts* (State Historical Society of Wisconsin) 290, Ex. E2 X 45.

Finally, when congress accepted the Treaty of Fort Stanwix, it ordered that the treaty:

> Be published and transmitted to the executives of the several states; and that it be declared, that no purchases, which have been or hereafter may be made from the Indians, at any treaties held or to be held with them, of their right to soil within the limits of any state, can, ought or shall be considered as interfering with the right of any such state to the jurisdiction or soil.

XXVIII *Journals of the Continental Congress* 426, 430 (June 3, 1785, June 6, 1785), Ex. E3 X 148. The New York delegation submitted the language reserving the states'

legislative right. Because Massachusetts had revived its claim to western New York, New York considered the right to secure land within its borders extremely important. By transmitting the peace treaty with the above reservation, congress expressly reassured the states that it did not intend the Treaty of Fort Stanwix to affect the states' right to purchase Indian land within the states' limits.

CONCLUSION

For the reasons discussed, the court finds that congress had neither the authority nor the intent to prohibit the states from purchasing Indian land located within their boundaries when the congress entered into the Treaty of Fort Stanwix in 1784 and issued the Proclamation of 1783. The land that New York purchased from the Oneidas in the 1785 and 1788 treaties was located within New York's recognized limits. Therefore, New York had the right to purchase the land in question, and the New York treaties did not violate either the Treaty of Fort Stanwix or the Proclamation of 1783.

Accordingly, plaintiffs' remaining claims based on the Articles of Confederation, the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix fail to state a cause of action upon which relief can be granted and are dismissed.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of December one thousand nine hundred and eighty-eight.

(SEAL)

THE ONEIDA INDIAN NATION OF NEW YORK, THE ONEIDA INDIAN NATION OF WISCONSIN, ONEIDA OF THE THAMES BAND, ET AL.,
Plaintiffs-Appellants,

THE HOUDENOSAUNEE, THE ONEIDA NATION, THE ONONDAGA NATION, THE MOHAWK NATION, THE SENECA NATION, and TUSCARORA NATION,
Plaintiffs-Intervenors-Appellants,

v.

STATE OF NEW YORK AND VARIOUS STATE AGENCIES: TWELVE NEW YORK COUNTIES, VALENTINE RYAN, INDIVIDUALLY AND AS CLASS REPRESENTATIVE: ST. REGIS PAPER COMPANY, INDIVIDUALLY AND AS CLASS REPRESENTATIVE: GEORGIA PACIFIC CORPORATION, INDIVIDUALLY AND AS CLASS REPRESENTATIVE: and NEW YORK STATE ELECTRIC AND GAS CORPORATION,
Defendants-Appellees.

Nos. 86-9052, 86-9072, 86-9074

(Filed Dec. 29, 1988)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants The Oneida Indian Nation of New York, The Oneida Indian Nation of Wisconsin, and The Oneida of The Thames Band,

Upon consideration by the panel that heard the appeal. it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken theron (sic).

Elaine B. Goldsmith,
Clerk

/s/ Fred M. Cassidy

By: Fred M. Cassidy,
Chief Deputy Clerk

Constitutional provisions, treaties, and statutes involved

1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Art. I, Sec. 10, United States Constitution

2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. VI, cl 2, United States Constitution

3. The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Art. VII, United States Constitution

4. No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted;

Art. VI, cl. 4, Articles of Confederation

5. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the 6th article;

Art. IX, cl. 1, Articles of Confederation

6. The United States in Congress assembled shall also have the sole and exclusive right and power of . . . managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated –

Art. IX, cl. 4, Articles of Confederation

7. The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

Art. II, Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15

8. Whereas by the ninth of the Articles of Confederation, it is among other things declared, that "the United States in Congress assembled have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any State, within its own limits, be not infringed or violated.: And whereas it is essential to the welfare and interest of the United States as well as necessary for the maintenance of harmony and friendship with the Indians, not members of any of the states, that all cause of quarrel or complaint between them and the United States, or any of them, should be removed and prevented: Therefore the United States in Congress assembled have thought proper to issue their proclamation, and they do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the

express authority and directions of the United States in Congress assembled.

And it is moreover declared, that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession or settlement.

Done in Congress, at Princeton, this twenty-second day of September, in the year of our Lord one thousand seven hundred and eighty three, and of our sovereignty and independence the eighth.

XXV Journals of the Continental Congress 602

(2) (3)

Nos. 88-1758; 88-1915

FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988.

ONEIDA INDIAN NATION OF WISCONSIN, ONEIDA OF THE THAMES BAND, AND INDIVIDUAL MEMBERS OF THE ONEIDA INDIAN NATION OF NEW YORK,
PETITIONERS,
THE ONEIDA INDIAN NATION OF NEW YORK,
PETITIONER,
v.
STATE OF NEW YORK AND VARIOUS STATE AGENCIES; TWELVE NEW YORK COUNTIES AND VALENTINE RYAN, INDIVIDUALLY AND AS CLASS REPRESENTATIVES; ST. REGIS PAPER COMPANY, INDIVIDUALLY AND AS CLASS REPRESENTATIVE; GEORGIA PACIFIC COMPANY AS CLASS REPRESENTATIVE; AND NEW YORK STATE ELECTRIC AND GAS CORPORATION,
RESPONDENTS.

JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Nos. 88-1758; 88-1915

In the
Supreme Court of the United States

OCTOBER TERM, 1988.

ONEIDA INDIAN NATION OF WISCONSIN, ONEIDA OF THE THAMES BAND, AND INDIVIDUAL MEMBERS OF THE ONEIDA INDIAN NATION OF NEW YORK,
PETITIONERS,

THE ONEIDA INDIAN NATION OF NEW YORK,
PETITIONER,

v.

STATE OF NEW YORK AND VARIOUS STATE AGENCIES; TWELVE NEW YORK COUNTIES AND VALENTINE RYAN, INDIVIDUALLY AND AS CLASS REPRESENTATIVES; ST. REGIS PAPER COMPANY, INDIVIDUALLY AND AS CLASS REPRESENTATIVE; GEORGIA PACIFIC COMPANY AS CLASS REPRESENTATIVE; AND NEW YORK STATE ELECTRIC AND GAS CORPORATION,
RESPONDENTS.

JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Counterstatement of the Case.

Defendants the State of New York; Twelve New York Counties and Valentine Ryan, individually and as class representatives; St. Regis Paper Company, individually and as class rep-

resentative; Georgia Pacific Company as class representative; and New York State Electric and Gas Corporation, oppose the petitions for a writ of certiorari numbered 88-1758 and 88-1915.

In these combined actions, originally filed in 1978 and 1979, petitioners seek to recover possession of and sovereignty over approximately 6,000,000 acres of land in central New York.[1] The original Oneida Indian tribe sold its rights to this land to New York State over 200 years ago. The sales in question took place by treaties under the authority of the New York Legislature, in 1785 and 1788, before the Constitution became effective and while the Articles of Confederation governed the relationship between the states and the Confederal Congress.

In the District Court and in the Second Circuit, the petitioners claimed that these sales were void, relying primarily on a 1784 Treaty between the Confederal Congress and various Iroquois tribes. They contended that this Confederal Treaty prevented their ancestral tribe from selling its rights to the land without the Confederal Congress' consent. Petitioners advanced this claim although, under the Articles of Confederation, the Confederal Congress did not have the *power* to prevent states from purchasing land within their own borders from Indians, and although the 1784 Treaty of Fort Stanwix contains not one word about preventing *purchases* of land by *anyone*, least of all the co-sovereign states.

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[1] The Court of Appeals described the land in question as "a swath of land in central New York 50 to 60 miles wide, extending from New York's southern border with Pennsylvania to its northern border with Canada." Petition 88-1758, Appendix, at 4 (hereafter "App.").

The Petition in number 88-1758 claims to be filed on behalf of "individual members of the Oneida Indian Nation of New York," as well as the "Oneida Indian Nation of Wisconsin" and the "Oneida of the Thames Band." It is doubtful whether the "individual members of the Oneida Indian Nation of New York" have standing to institute or pursue this claim. *See Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979).

Respondents originally moved to dismiss the cases in 1980, and the District Court granted the motions in 1981. *Oneida Indian Nation of New York* v. *State of New York*, 520 F. Supp. 1278 (N.D.N.Y. 1981). On petitioners' first appeal to the Second Circuit, that court affirmed the dismissal of petitioners' constructive trust and Trade and Intercourse Act claims. *Oneida Indian Nation of New York* v. *State of New York*, 691 F.2d 1070, 1095-1096 (2d Cir. 1982).[2] With respect to petitioners' claims under the Articles, the Treaty of Fort Stanwix and the Proclamation of 1783, however, the Second Circuit remanded the cases to the District Court to conduct an evidentiary hearing to aid the court in construing those ancient documents. *Id.* at 1086, 1095.

On remand, the District Court conducted the mandated evidentiary hearing. It lasted 9 trial days, and generated 1,467 pages of transcript and an even greater amount of documentary evidence. The court heard testimony from 10 of this Country's foremost experts on the Confederal period, concerning the drafting of the documents in question, the prevailing practices of the States and the Confederal government concerning Indian affairs, and the constructions accorded the pertinent documents by significant eighteenth century statesmen and the Oneidas.

After evaluating this extensive evidence, the District Court again ruled that petitioners could not recover as a matter of law. 649 F. Supp. 420 (N.D.N.Y. 1986). The court's Order was accompanied by a 57 page memorandum opinion. App. 53-109.

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[2] In rejecting petitioners' "constructive trust" theory, the Second Circuit also rejected petitioners' "fraud" theory. 691 F.2d at 1096; App. 6. Nevertheless, the petitioners in No. 88-1758 resurrect this word at a number of points in their brief, as if the invocation of the word somehow makes this case more certworthy. It does not. Petitioners' "fraud" theory was correctly rejected by the Second Circuit in 1982. Moreover, respondents note that the lands in question were *purchased* by New York from the Oneidas, and that respondents introduced extensive evidence at the evidentiary hearing of the intensity and fairness of the negotiations.

Petitioners appealed for a second time to the Second Circuit, contending primarily that the District Court had misconstrued the historical evidence presented at the hearing. The appeal was argued to the panel of Judges Newman, Winter and Kearse on June 2, 1987. On October 31, 1988, the circuit court issued its 57 page Opinion affirming the District Court's dismissal across the board.[3] 860 F.2d 1145 (2d Cir. 1988). Essentially, the Circuit Court held that, unlike the allocation of power established by the Constitution, the "legislative right" proviso of Article IX(4) of the Articles of Confederation reserved to the states the power to extinguish Indian title to lands within their borders, and that such a clause had been fundamental to the division of power between the states and Confederal government established under the Articles. The court held that under the Articles it was questionable whether the Confederal Congress had *any* power to prohibit states from extinguishing Indian title to lands within their borders, but in any event the Confederal Congress certainly had not exercised such a power in the Treaty of Fort Stanwix or the Proclamation of 1783. Finally, the court rejected petitioners' argument that some vague power of "external sovereignty" which resided in the Confederal Congress preempted the right of states to extinguish Indian title within their borders.

Reasons the Writ Should Be Denied.

Petitioners now seek writs of certiorari from this Court. Not surprisingly, they offer no arguments that were not fully litigated, considered, and decided against them, both by the District Court and the Court of Appeals. Moreover, the issues peti-

[3] The court obviously had carefully reviewed the District Court record, noting that "detailed examination of [the record] occasioned the delay in issuing this opinion." App. 7.

tioners ask this Court to address either are not likely to recur in any litigation in the federal courts, or otherwise are so arcane or mundane as not to merit this Court's attention. The Articles of Confederation, on which this case turns, have been defunct for over 200 years. The Treaty of Fort Stanwix itself is over 200 years old, and was essentially superseded by the 1794 Treaty of Canandaigua. 7 Stat. 44. This Court ordinarily does not grant certiorari to construe a defunct constitution and an archaic, superseded Treaty;[4] nor do petitioners suggest that the Second Circuit's decision conflicts with decisions of any of the other Courts of Appeals.

Finally, and equally importantly, the Second Circuit's decision is both comprehensive and correct. The court carefully addressed petitioners' complex claims and the voluminous record, and delivered an extraordinarily lucid and sensible opinion. Petitioners have had their opportunity fully and fairly to litigate their claims; those claims have been properly rejected, and there is no substantial reason for this Court to grant further review, thereby continuing to cloud the title to nearly 6,000,000 acres of real estate overwhelmingly owned by innocent New York citizens, companies and eleemosynary and governmental institutions which did not even exist at the time in question.[5]

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[4] Thus, this case is very different from *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U.S. 226 (1985). That case involved land purchased in 1795, after the Constitution became effective and the Trade and Intercourse Act had been enacted. As the Second Circuit recognized, unlike *post*-constitutional land purchases, the entire approach to *pre*-constitutional land purchases is different, and must reflect the radically different division of governmental powers over Indian affairs which prevailed during that period.

[5] Indeed, one can only imagine the political chaos that would ensue if petitioners were to prevail on these claims, and thereafter sought to evict the present landowners and to establish sovereignty over the claim area.

I. This Case Does Not Involve Recurring Issues of Federal Law or Conflicting Decisions Among the Courts of Appeals.

The Second Circuit stated that "[this] appeal is unusual because it requires a federal court, perhaps for the first time, to determine whether actions of a state violated the Articles of Confederation." App. 3.

That statement concisely captures why review of the Second Circuit's decision is unnecessary. First, because this case primarily involves construction of the Articles of Confederation, it does not involve important issues of federal law — in the sense that those issues are likely to recur. This case is, indeed, "unusual." It is not necessary for this Court, particularly given the comprehensiveness of prior proceedings, to address these arcane issues.[6]

Second, in assessing petitioners' claims it cannot be overemphasized that this case is governed by, and must be evaluated in light of, the Articles of Confederation. Only if certain critical facts about the Articles are ignored do petitioners' arguments even begin to make sense.

It is elementary that the Articles and the Constitution are fundamentally different. One was expressly a confederation

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[6] In fact, this case more properly is characterized as involving *confederal* law, not federal law. The fact that this case turns on the Articles led the Second Circuit in its most recent opinion to question the basis for federal jurisdiction for at least some of petitioners' claims. App. 9-11.

The petitioners in No. 88-1758 half-heartedly suggest, Petition at 4 n.3, that the 1788 Treaty between New York State and the Oneidas actually should be considered as a Treaty entered into after the Constitution became effective. This argument was flatly rejected by the Second Circuit in the first appeal, 691 F.2d at 1079 n.6, based upon Chief Justice Marshall's unequivocal opinion for this Court in *Owings* v. *Speed*, 18 U.S. (5 Wheat.) 420 (1820). It is doubtful that the question is properly preserved for this Court's review. In any event, *Owings* squarely holds that the Constitution did not become effective until March 1789, after conclusion of the 1788 Treaty between New York and the Oneidas.

of sovereign states; the other expressly a Constitution established by "the People of the United States, *in order to form a more perfect union . . . .*" *U.S. Const.*, Preamble (emphasis supplied). One was the first attempt at an instrument of government by parties paradoxically joined together to throw off a tyrannical central authority; the other was "an alteration in the first principles and main pillars of the fabric" of the first, *The Federalist No. 15*, to guard against "anarchy, civil war, a perpetual alienation of the states from each other," *The Federalist No. 85*. One failed utterly, after only eight years; the other is now celebrating its 200th.

The Second Circuit highlighted the most important of the differences between the Articles and the Constitution:

> The fundamental structure of the Articles is one of limited delegation of powers to the national government with reservation to the states of all powers not delegated. Article II provides:
>
> > Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.
>
> The Necessary and Proper Clause, which played such a significant part in the shaping of federal powers under the Constitution, *see McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) was absent from the Articles of Confederation.

App. 15.

Both in this Court and the courts below, petitioners have ignored these fundamental differences between the Articles and the Constitution. Again and again, petitioners have grounded

their arguments in cases and governmental theory which spring from the Constitution, which provides the national government with plenary authority over Indian affairs. For this reason, petitioners' arguments, superficially appealing as they may be, are, on deeper examination, historically inaccurate and legally bankrupt. Thus, for example, petitioners argue that the Treaty of Fort Stanwix should be broadly construed to preempt state authority over Indian affairs, based upon cases construing post-constitutional treaties, while ignoring the division of power that prevailed when that Treaty was written.

These cases involve, at base, an assessment of the power of a *state* during the Articles' period. History tells us that under the Articles the presumptions must *favor* state power. The Second Circuit's essential conclusion — that under the Articles the power to extinguish title to Indian lands within state borders resided with the states, and not the Confederal Congress — is in perfect harmony with both the text and the history preceding the adoption of the Articles of Confederation.

II. The Second Circuit Correctly Decided the Issues on Which Petitioners Seek Review, and Those Issues In Any Event Are Not Substantial.

Despite the fact that the issues raised in these cases will necessarily be arcane, petitioners have attempted to construct "questions presented" which have broader application. Petitioners' efforts notwithstanding, none of those issues merits this Court's attention.

A. *The Second Circuit Correctly Determined that the States Had the Power to Extinguish Indian Title to Lands Within Their Borders Pursuant to Article IX(4).*

First, petitioners in No. 88-1915 argue that the Second Circuit misconstrued the Articles of Confederation, thereby de-

priving "the national government [of] its sovereign power over the extinguishment of Indian title" for the few years during which the Articles of Confederation were effective. Petition No. 88-1915, at i, 11-12. The short answer is that this is not a substantial federal question. In any event, as the Second Circuit concluded, the "legislative right" proviso of Article IX(4) was expressly intended to retain the right to extinguish Indian title within state borders for the individual states.

Petitioners' argument that the Second Circuit's opinion creates a 9-year "anomaly" of state authority to extinguish Indian title sandwiched between two periods of national authority is completely misguided. Petition 88-1915, at 11. First, even plaintiffs' expert, Dr. Reginald Horsman, agreed that the power to extinguish land title within state borders resided with the several states from the beginning of the Revolution until adoption of the Articles. The "legislative right" proviso simply retained that power in the States. Second, petitioners' argument again ignores the fundamental differences between the Articles and the Constitution. The Articles *were* "anomalous." They instituted a radically different division of governmental powers from what preceded and succeeded them. The Second Circuit surely did not err by correctly identifying this anomaly, or the consequences for Indian title which flow from it. Petitioners' argument to the contrary proceeds as if the Revolution and the Articles never happened.

Third, in any event issues related to the construction of Article IX(4) do not merit this Court's attention. Petitioners make the unsupported claim that "massive Indian land transactions occurred" between 1781 and 1789, Petition 88-1915, at 7; there is, however, no evidence of such "massive" transactions. These are the only lawsuits which raise these issues.

Lastly, petitioners argue that Article IX(4)'s provision preserving to the states the "legislative right" to extinguish Indian title within state borders is somehow trumped by the doctrine of

external sovereignty adumbrated by this Court in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Petitioners quote a passage from *Curtiss-Wright* which states:

> Since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.

Curtiss-Wright, 299 U.S. at 316. Petitioners reason that "[s]ince the states individually never held power over matters of war and peace, the Articles of Confederation could not limit Congress' external sovereign power in that area." Petition 88-1915, at 18.

Again, the Second Circuit properly rejected this argument; first, because the power to deal with Indian tribes within the boundaries of the states does not involve the powers of "external sovereignty" described in *Curtiss-Wright*, and second, because *Curtiss-Wright* expressly held that the powers of external sovereignty there described, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320. *See* App. 37-38, 40. The powers of external sovereignty could not trump the limitations provided by Article IX(4), any more than they could trump applicable limitations in the United States Constitution.

Moreover, petitioners' argument is an obvious *non sequitur*. It is one thing to say that the states *severally* did not possess external sovereignty; it is quite another to say that the states, sitting as the Confederation, did not have that power. Since, plainly, the states as a Confederation did have complete powers of external sovereignty, they surely were free to delegate those powers as they chose — *even to themselves as individual states*.

That is precisely what was done in Article VI(5), which conferred on the states the power to wage war where the "state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state . . . ." In sum, petitioners' argument that the powers of "external sovereignty" set forth in *Curtiss-Wright* somehow trump the provisions of Article IX(4) is unsupportable.[7]

B. *The Second Circuit Correctly Construed the Treaty of Fort Stanwix and Properly Applied this Court's Rules of Construction for Indian Treaties.*

Next, both sets of petitioners argue that the Second Circuit misconstrued the 1784 Treaty of Fort Stanwix. Petitioners contend that that Treaty was a proper exercise of the Confederal Congress' powers either under Article IX(1) or Article IX(4), and that by the Treaty the Confederal Congress expressly preempted any state authority to extinguish Indian title without the Confederal Congress' consent. In so arguing, petitioners complain that the Second Circuit so seriously disregarded this Court's rules of construction for Indian treaties that this Court should grant certiorari simply to straighten out this portion of the Second Circuit's opinion.

Again, questions concerning the construction of the Treaty of Fort Stanwix are not substantial federal questions. The

[7] The Second Circuit also rejected the argument that New York's purchases were void because they so implicated matters of war and peace that they were impliedly preempted by Article IX(1) or by the Confederal Congress' powers of "external sovereignty." The Second Circuit held that this limited question concerning the relationship between New York's actions and the confederal war and peace powers was non-justiciable. App. 38-39. The decision is correct. Moreover, it involved only a small part of the Second Circuit's decision, and respondents do not understand either petition for certiorari to press such an implied preemption argument.

Treaty was concluded in 1784, and has no practical application today.

The Second Circuit's opinion with respect to these Treaty construction issues once more is comprehensive and persuasive. Article II of the Treaty, upon which the Oneidas rely, states:

> The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

App. 113.

As the Second Circuit stated: "Manifestly this provision does not say in terms that the Oneidas may not sell their lands to New York without the consent of Congress." App. 42. Indeed, this is an understatement; the provision contains no express words of prohibition at all, least of all prohibition of *sales*. And it says nothing at all about states. The prohibition that petitioners seek to imply is accordingly quite extraordinary.

Furthermore, in context it is plain that the Treaty of Fort Stanwix was a peace treaty, not between New York and the Oneidas, but between the Oneidas, the confederal government, and the four hostile Iroquois tribes which had fought on the side of the British during the Revolution. As the Second Circuit ruled, the language in question was intended to confirm to the Oneidas that their lands would not be involuntarily appropriated either by the United States or by the four hostile tribes. App. 43-44. New York State was not represented during the Treaty negotiations.

Despite this language and history, petitioners have argued that Article II of the Treaty was intended to prohibit New York from purchasing Indian lands within its borders without the consent of the Confederal Congress. In crafting this argument,

the Indians relied heavily on what they claimed were standard canons of Indian treaty construction — that ambiguities in Indian treaties are to be resolved in favor of the Indians; that such ambiguities are to be resolved in accordance with the Indians' understanding of the treaties; and that Indian treaties are to be broadly construed to pre-empt state authority. Petitioners claim here that the Second Circuit not only ignored but altered these canons of construction. Petition 88-1758, at 10-11, 17-18; Petition 88-1915, at 19-23.

In fact, the Second Circuit applied each of the canons of construction described above, and reached its conclusion in accordance with those principles. App. 42, 49. The court advanced a number of good reasons for rejecting petitioners' arguments. First, the court was understandably reluctant to read the simple language of Article II of the Treaty as impliedly preempting New York's hard-won authority, established in Article IX(4), over Indian lands within its borders. Second, the court cited this Court's decision in the *United States* v. *Minnesota*, 270 U.S. 181, 209 (1926), which holds that Indian treaties should not be construed to divest states of property rights "unless the purpose so to do be shown in the Treaty with such certainty as to put it beyond reasonable question." Third, the court noted that it was not willing to construe the Treaty "in favor of the Indians," if such a construction required the court to conclude that the Treaty imposed a perpetual limitation on the Indians' ability to alienate their land voluntarily.[8] App. 42-43. And finally, the court canvassed the historical

[8] Petitioners cite *The New York Indians* (*Fellows* v. *Denniston*), 72 U.S. (5 Wall.) 761 (1867), as a case holding that the Treaty of Fort Stanwix imposed limitations on the State of New York. Unlike the *voluntary* purchase and sale at issue here, however, *Fellows* involved an involuntary state tax imposed on Indian lands. Furthermore, *Fellows* simply identifies, without substantive analysis, a number of treaties which are said to limit New York's authority to impose the tax. Most of these Treaties were entered into *after* the Constitution became effective. The *Fellows* Court lumped the Treaty of Fort Stanwix with

record, and determined that preemption of New York's authority to purchase Indian lands was *not* intended. *Id.* at 43-49. The court concluded that Article II of the Treaty "would have to be not merely construed but virtually rewritten" to arrive at the Indians' proposed meaning. *Id.* at 50.

In sum, there is no substantial federal question concerning construction of the Treaty of Fort Stanwix.

C. *The Second Circuit Properly Resolved This Case on Motions to Dismiss.*

Finally, petitioners argue that the Second Circuit improperly resolved issues of fact with regard to the motions to dismiss.

Again, the question whether the Second Circuit properly applied Federal Rules of Civil Procedure 12(b)(6) and 56 under the facts of this case is not an issue which merits a commitment of this Court's "scarce judicial resources." *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). In any event, petitioners' argument is incorrect. Each of the issues decided by the Second Circuit was an issue of law. The principal issues raised by the motions to dismiss and decided by the Second Circuit were (1) whether the Confederal Congress had the power, under the Articles of Confederation or some vague concept of "external sovereignty," to prevent a state from purchasing land from the Indians within its limits, and (2) whether the Confederal Congress exercised that power through the Treaty of Fort Stanwix or the Proclamation of 1783. Each of those questions is a question of law. The first involves construction of the Articles of Confederation; the second involves construction of a Treaty or legislative proclamation. Accordingly, this case properly was decided on motions to dismiss.

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these post-constitutional treaties, without discussing the important distinction as to the time of adoption. This off-hand reference to the Treaty does not undermine the Second Circuit's analysis.

The petitioners' confusion stems from the evidentiary hearing held by the District Court in deciding the motions to dismiss, and the review of the results of that evidentiary hearing by the Court of Appeals. But the evidentiary hearing was held, at the direction of the Second Circuit, merely to marshal and assess extrinsic aids to the construction of the Articles, the Treaty, and the Proclamation — that is, to aid in the determination of questions of law. 691 F.2d at 1086. The procedure may be unusual, but it did not change a question of law into a question of fact. When ruling on motions to dismiss, courts regularly resolve factual arguments concerning the intent of the drafters of statutes, treaties, or constitutions; aside from utilizing an evidentiary hearing to resolve such conflicts concerning 200 year old documents, this case was no different.[9]

Conclusion.

For the past 10 years petitioners' claims in this case have placed a cloud on the title to nearly 6,000,000 acres of real estate, held by innocent residents of the State of New York. Petitioners' claims have been carefully scrutinized on two occasions by both the District Court and the Court of Appeals. A comprehensive trial-type evidentiary hearing was held, at the instance of petitioners, to aid the construction of the ancient documents at issue. At each turn, petitioners' claims have been

[9] Incredibly, petitioners in 88-1758 seem to suggest that still further factual development is necessary, calling the prior proceeding "truncated." Petition 88-1758 at 22-23. The massive evidentiary undertaking already concluded is sufficient to resolve legal issues concerning the construction of the Articles, the Treaty and the Proclamation.

found wanting. It is time for this litigation to end. The petitions present no recurring or substantial issues of federal law which merit this Court's attention.

Respectfully submitted,

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